IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 438

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, et al.,

*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS


GEORGE B. PLETSCH AND
ROBERT S. HUNT
231 South La Salle Street
Chicago 4, Illinois

STANFORD CLINTON
134 North La Salle Street
Chicago 2, Illinois

LAWRENCE C. MILLS
29 South La Salle Street
Chicago 3, Illinois

*Counsel for Petitioners*

LOUIS L. ROCHMES
1300 Connecticut Ave.
Washington 6, D. C.
*Of Counsel*


La Salle Street Press—Chicago 10

PAGE

Opinions below ..... 2

Jurisdiction ..... 2

Questions presented ..... 2

Statutes and treaties involved ..... 3

Statement ..... 3

Reasons for granting the writ ..... 6

Conclusion ..... 25

Appendices:

A.—Statutes and treaties ..... 26

B.—Opinions and judgment below ..... 43

C.—Excerpts from statements ..... 76

## CITATIONS

Cases:

Alcea Band of Tillamooks v. United States, 103 Ct.Cl. 494, 59 F.Supp. 934 (1945), aff'd, 329 U.S. 40 (1946) ..... 16, 17, 23

Choctaw Nation v. United States, 128 Ct.Cl. 195, 121 F.Supp. 206 (1954) ..... 23

Crow Tribe of Indians v. United States, 151 Ct. Cl. 281, 284 F.2d 361 (1960) ..... 15

Johnson v. Mackintosh, 8 U.S. (Wheat.) 543 (1823) . 19

Miami Tribe of Oklahoma v. United States, 146 Ct.Cl. 421, 175 F.Supp. 926 (1959) ..... 22

Minnesota v. Hitchcock, 185 U.S. 373 (1902) ..... 21

PAGE

Otoe and Missouria Tribe of Indians v. United States, 131 Ct.Cl. 593, 131 F.Supp. 265 (1955) ..... 9, 15, 16, 21

Pottawatomie Tribe of Indians v. United States, 125 Ct.Cl. 60, 111 F.Supp. 256 (1953) ..... 8

Quapaw Tribe of Indians v. United States, 128 Ct.Cl. 45, 120 F.Supp. 283 (1954) ..... 17

Sac and Fox Tribe of Indians of Oklahoma v. United States, 5 Ind. Cl. Comm. 367 (1957) ..... 12

Saginaw Broadcasting Co. v. Federal Communication Commission, 96 F.2d 554 (D.C. Cir.), cert. den., 305 U.S. 613 (1938) ..... 13

Snake or Piute Indians v. United States, 125 Ct.Cl. 241, 112 F.Supp. 543 (1953) ..... 13, 14, 15, 17, 18

Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) ..... 23

Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1951) ..... 14

STATUTES AND TREATIES:

Indian Claims Commission Act, 60 Stat. 1049 (1946):

Sec. 2 (25 U.S.C. § 70a) ..... 3, 8, 26

Sec. 19 (25 U.S.C. § 70r) ..... 3, 13, 28

Sec. 20 (25 U.S.C. § 70s) ..... 3, 15, 28

Treaty of Fort Harmar, 1789, 7 Stat. 28 ..... 4, 23

Treaty of Greenville, August 3, 1795, 7 Stat. 49 ..... 3, 5, 21, 22, 23, 39

Treaty of November 3, 1804, 7 Stat. 84 ..... 3, 5, 6, 7, 8, 9, 10, 31

MISCELLANEOUS:

18th Annual Report of the Bureau of American Ethnology, 1896-97, Part 2 "Indian Land Cessions in the United States," compiled by Charles C. Royce 5

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. . . . . .

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, et al.,

*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners[1] pray that a writ of certiorari issue to review a judgment of the United States Court of Claims entered in the above titled case on April 5, 1963.

[1] The Petitioners are: The Sac and Fox Tribe of Indians of Oklahoma, the Sac and Fox Tribe of Missouri and Sac and Fox Tribe of the Mississippi in Iowa, and Don Whistler, Edward Mack, Pauline Lewis, William Newashe, Amos Black, Charles W. Robidoux, John Connell, Dorothy Gilfillian, Thomas Green, Thomas Herrick, Kenneth Youngbear, Charles Davenport, Harry Lincoln, Albert Davenport, Edward Davenport, Percy Bear, and Columbus Keahna, appearing as the representatives of and on the relation of the Confederated or United Tribes of Sac and Fox Indians and as representatives and on behalf of all of the Members thereof.

## CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Claims is reported in .... Ct. Cl. ...., 315 F.2d 896 (1963) and is printed in Appendix B hereto (p. 43).

The opinion of the United States Indian Claims Commission is reported at 7 Ind. Cl. Comm. 708 (1959), and is printed in Appendix B hereto (p. 63).

## JURISDICTION

The judgment of the United States Court of Claims was entered on April 5, 1963. A timely motion for rehearing was denied on June 7, 1963. The jurisdiction of this Court is invoked under Section 20(c) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1054, 25 U.S.C. § 70s(c) and 28 U.S.C. § 1255(1).

## QUESTIONS PRESENTED

1. Whether the Indian Claims Commission may properly disclaim jurisdiction to pass on the validity of a treaty for the purpose of determining claims of Indian tribes to certain lands under the Indian Claims Commission Act, and whether the Commission and the Court of Claims erred in not declaring such treaty ineffective for that purpose.

2. Whether the Commission erred in failing to make a finding as to the probative value of certain contemporaneous statements by public officials about use and occupancy of certain lands by the Sac and Fox Nation, and whether the Court of Claims erred in not remanding the case to the Commission to make this finding.

3. Whether the Court of Claims erred in holding, as a matter of law, that the Sac and Fox Nation did not own

certain lands "for a long enough time" and whether title acquired by conquest should be treated any differently, in terms of duration of occupancy, than title acquired in any other manner.

4. Whether an Indian tribe is entitled to recover damages under the Indian Claims Commission Act for its possessory interest in certain lands even though such interest may not have constituted either "recognized" or "aboriginal" title.

5. Whether the United States recognized the title of the Sac and Fox Nation to the lands here involved by the Treaty of Greenville.

## STATUTES AND TREATIES INVOLVED

The statutory provisions and the treaties involved are §§ 2, 19, and 20 of the Indian Claims Commission Act, 60 Stat. 1049 *et seq.* (1946), 25 U.S.C. §§ 70a, 70r, and 70s (Supp., 1963); the Treaty of November 3, 1804 (7 Stat. 84); and the Treaty of Greenville, August 3, 1795 (7 Stat. 49). They are printed in Appendix A hereto (pp. 26-42).

## STATEMENT[1]

The scene of this controversy is the upper Mississippi

---

[1] The following abbreviations are used from time to time in this petition:

Act—Indian Claims Commission Act of 1946.

App.—One of the Appendices attached to this petition.

Ct. Cl. App.—Appendix to Brief of Sac and Fox Tribe in the proceeding before the Court of Claims, Appeal No. 1-61.

D. Ex.—Defendant's exhibit.

Find.—Findings of the Indian Claims Commission issued June 12, 1959.

S. & F. Ex.—Petitioners' exhibit.

Tr.—Transcript.

valley and its subject, 5,800,000 acres of land. The time is roughly between the end of the French and Indian Wars and the second term of Andrew Jackson.

Petitioners, successors to the old Sac and Fox Nation, filed suit against the United States under the Indian Claims Commission Act of 1946 (60 Stat. 1049, 25 U.S.C. § 70 *et seq.*) to recover compensation for lands they used to own in western Illinois, southwestern Wisconsin, and northeastern Missouri.[1]

In the first part of the 18th century the advance of the French drove the Sac and Fox Nation from their home in Wisconsin down the Mississippi valley into Iowa and Illinois (Ct. Cl. App., 98-99, 114-23). Between the Mississippi and the Illinois rivers—particularly in the disallowed acreage—they ran into the Illinois Nation of Indians, whom, after a series of conflicts, they drove across the Illinois river so that by 1765 there were no Illinois Indians using and occupying the disallowed acreage (Ct. Cl. App., 101). In Missouri, the Sac and Fox encountered the Osage and the Missouria and by at least 1790 had driven them from the Missouri River (Ct. Cl. App., 110-11).

The Sac and Fox were in the Illinois disallowed acreage, accordingly, at the time of the American Revolution (in the middlewest, they were our only Indian allies) (S. & F. Exs. 1, 2, 7), and in all of the disallowed acreage at the time of the Treaty of Fort Harmar (7 Stat. 28) in 1789, the Treaty

[1] These lands are shown on the map appended to this petition for the convenience of the Court in identifying the various acreages. The lands for which the Commission held the Sac and Fox were entitled to recovery are shown in red; the lands as to which recovery was denied are shown in green (the Illinois disallowed acreage) and in yellow (the Missouri disallowed acreage); the lands shown in blue are those for which the Sac and Fox made no claim.

of Greenville (7 Stat. 49; App. A, p. 39) in 1795, and the Treaty of 1804 (7 Stat. 84; App. A, p. 31).

Petitioners filed their joint petition before the Commission in November of 1950, and Defendant filed its answer in July of 1952. Hearings were held on the issue of title from January 31 through February 3 of 1956.[1]

The Indian Claims Commission rendered its decision on title in June of 1959. It held that the Sac and Fox were entitled to recovery as to certain lands in northwestern Illinois, southern Wisconsin, and northeastern Missouri, all of which amounted to some 3,000,000 acres and are shown in red on the map. But the Commission denied recovery as to some 5,000,000 acres in western Illinois and some 800,000 acres in northeastern Missouri.[2] The disallowed acreage in Illinois is located between the acreages for which recovery was granted, and the disallowed acreage in Missouri borders the northern bank of the Missouri river and is contiguous to, and immediately south of, the acreage as to which the Commission allowed recovery. All of the lands are within the area known as Cession 50.[3]

---

[1] Under the Commission's procedure the issue of title is to be tried and decided prior to going to trial on issues relating to valuation. There were also five days of hearings on Defendant's third defense in which Defendant contended that title to the lands was extinguished by conquest with the defeat of the Sac and Fox in the Black Hawk War. Petitioners' motion to strike this defense was granted by the Commission in November of 1954. 3 Ind. Cl. Comm. 395.

[2] This combined acreage is referred to in this petition as the "disallowed acreage". The disallowed acreage in Illinois is shown in green and the disallowed acreage in Missouri is shown in yellow on the map.

[3] Cession 50 is that land designated by Charles C. Royce in "Indian Land Cessions in the United States," Part 2 of the 18th Annual Report of the Bureau of American Ethnology, 1896-1897. The boundaries of Cession 50 are the boundaries of the lands described in the Treaty of 1804 and include all of the lands, both allowed and disallowed, claimed by the Sac and Fox. As to certain lands in Cession 50 the Sac and Fox made no claim; these are shown in blue on the map.

The Commission held that Petitioners were not entitled to recovery for the disallowed acreage because, in 1804, the United States acquired these lands by a treaty and, at that time the Sac and Fox had neither "recognized" nor "aboriginal" title. Petitioners contended, and still contend, that the Treaty of 1804 was not binding on the Sac and Fox because the Indian representatives had no authority to sign it. Accordingly, Petitioners contend, the Sac and Fox Nation's interests in the disallowed acreage did not cease in 1804.

Petitioners appealed to the Court of Claims assigning errors of law, disregard and misinterpretation of evidence, and promulgation of findings without evidentiary support. The Court of Claims, in affirming the Commission, also held that the Sac and Fox had neither recognized nor aboriginal title to the disallowed acreage. The Court of Claims also held that even if the Sac and Fox did use and occupy the disallowed acreage, they did not do so for a long enough time prior to 1804, particularly since title was acquired by conquest (App. B, pp. 59-60). In addition, the Court of Claims failed to pass on the Treaty of 1804 believing it to be unnecessary to do so for the purpose of its decision (*Id.* at 50-52).

## REASONS FOR GRANTING THE WRIT

**1. The Treaty of 1804.** The Commission held that by the Treaty of 1804 the Sac and Fox relinquished forever all their interests in the Cession 50 lands. To do this the Commission had to hold—as it did—that the Treaty was valid and binding on the Sac and Fox (App. B, p. 66). The evidence disclosed that the Sac and Fox had no notice that a possible treaty was to be signed: the five representatives

who signed had been sent to St. Louis for an entirely different purpose, and they had no authority to sign a treaty ceding the Nation's lands.[1] Indeed, at an early stage in the proceedings, the Defendant signed a Stipulation that the Treaty of itself had no validity (Ct. Cl. App., 68-69).[2] The evidence was uncontroverted that the Sac and Fox never recognized the Treaty, that they protested and resisted it at every turn, and that finally in 1832 it took armed conflict by the United States in the Black Hawk War to drive the last remnants of the Nation from the disallowed acreage (S. & F. Exs. 22, p. 2, 23, 67, 68, 71, 76, 77, 81, 84, 88, 106, 113, 115, 116, 120, 140, 141, 147, 153, 158, 266, 321).

---

[1] Early in 1804, Sac and Fox hunters had killed one or more white persons who had been trespassing on Sac and Fox lands near the Cuivre river in northeastern Missouri. Governor Harrison sent a messenger to the Sac and Fox chiefs directing them to surrender the murderer. The message contained no reference to a possible cession of land. Ten days later the five Sac and Fox arrived at St. Louis with the miscreant who surrendered himself as a peace offering. Seven days later the five Indians were induced to sign the treaty. (S. & F. Exs. 12, 14-16, 114, 265 pp. 3-4, 266; Tr. 400, 430-434).

[2] The Stipulation expressed Defendant's contention that the Treaty of 1804 was ratified by subsequent treaties. We realize that such a Stipulation is not binding upon the Commission or the courts. However, the entire case was tried in accordance with the Stipulation, and for the first time, in its brief before the Court of Claims, Defendant, without notice or request to be relieved of the Stipulation, appears to have disavowed its agreement and urged that the Treaty of 1804 was valid. We have difficulty in squaring the words of the Stipulation:

> "The government concedes that the treaty of 1804 of itself has no validity but contends that [subsequent treaties] validated said treaty of 1804"

with the statement in Defendant's brief: "• • • we do not believe • • • that the so-called stipulation which set forth the contentions of the United States can properly be construed as a stipulation that the treaty of 1804 was invalid • • •" (p. 78).

Nevertheless, the Commission upheld the Treaty because "any question concerning the validity of a properly executed treaty is not open for ordinary judicial inquiry * * *". (App. B, p. 65). With the general principle we concur: a duly ratified treaty normally has the status of an Act of Congress. But this is not "normally", and these proceedings are not "*ordinary* judicial inquiry." This is a suit under the Indian Claims Commission Act.

The Commission, we respectfully submit, has either disregarded or misinterpreted the Act it was created to administer. Section 2 directs the Commission to hear and determine, among others,

> "(3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other grounds cognizable by a court of equity;" and
>
> * * *
>
> "(5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." (60 Stat. 1050, 25 U.S.C. § 70a).

Clearly, this language is a charter permitting—indeed, compelling—the Commission to determine whether a treaty was executed without the knowledge, consent, or authority of the tribe. See *Pottawatomie Tribe of Indians* v. *United States*, 125 Ct. Cl. 60, 66, 111 F.Supp. 256, 259 (1953). Whether this constitutes "invalidation" or "reformation" or "revision" or "interpretation" is but an exercise in semantics and logomachy. The important thing is that the claim here asserted comes squarely within the purview of Section 2 of the Act whether it be because of "fraud", "duress", "mutual or unilateral mistake", or vio-

lation of "fair and honorable dealings". If the Commission's conclusion stands—that it does not have jurisdiction to determine whether a treaty was signed by unauthorized representatives of an Indian tribe—then, we submit, the Commission has gone a long way in repudiating the express provisions of the Act and frustrating its intent. The very purpose of the Act is, once and for all, to put at rest all claims—legal, equitable, and moral—of the tribes against the United States, and to remove, once and for all, the blot on our collective conscience. *Otoe and Missouria Tribe of Indians* v. *United States*, 131 Ct. Cl. 593, 603-22, 131 F.Supp. 265, 272-83 (1955). This circumscription placed by the Commission on its own jurisdiction violates that purpose.

The Court of Claims referred to this restrictive interpretation,[1] but it did not reverse the Commission. It did not even pass on the Treaty because it felt this was unnecessary to decide the case (App. B, pp. 51-52). According to the Court of Claims, the only question dependent upon the effectiveness of the Treaty of 1804 was the determination of a date for valuation purposes. (*Ibid.*).

Yet the assumption that the Treaty of 1804 was valid was vital to the two principal holdings of the Court of Claims: namely, that use and occupancy of the disallowed acreage by the Sac and Fox Nation were either not of a long enough duration to create Indian title or they constituted merely the exercise by the Sac and Fox of the privilege, as provided in Article VII of the Treaty of 1804, of living and hunting upon the lands so long as they remained

[1] At one point the Court of Claims seemed to recognize the impact of the Indian Claims Commission Act on the traditional principle. "*Putting to one side the effect of the Claims Commission Act*, there is much authority that the courts cannot inquire whether a duly promulgated treaty * * * was validly consummated * * *" (Emphasis supplied). (App. B, p. 51 n. 7).

the property of the United States. Obviously, if the Treaty of 1804 is regarded as invalid, then the use and occupancy of the disallowed acreage by the Sac and Fox Nation after 1804 is on the same basis as it was prior to that date and should for all purposes be considered as evidence of the Nation's ownership of these lands. The evidence thus disregarded is formidable and conclusive and covers a span of twenty-eight years from 1804 to 1832. Defendant aptly calls this documentation a "mass of post-1804 evidence."

Moreover, the Sac and Fox Indians used and occupied the disallowed acreage in the period subsequent to 1804 because the Nation contended that these were its lands and they had never been validly ceded to the United States. Sac and Fox use and occupancy accordingly were based upon a claim of right and reflected a continuation of the use and occupancy that occurred before the Treaty of 1804. In no sense was the usage based upon a privilege conferred by that treaty nor did any official of the United States so look upon it at the time.

The Court of Claims stated that even if the Treaty of 1804 were invalid there was a unilateral taking in 1804 "and there could have been little doubt in the minds of the Indians that the United States was continuously asserting full ownership of the area after the Treaty." (App. B, p. 52). But by the same token, there was no doubt in any one's mind that the Sac and Fox Nation never recognized the validity of the Treaty—which at one point the Court of Claims seems to recognize[1]—and were asserting full rights to the area.

**2. The Contemporaneous Statements by United States Officials.** The Commission held that the Sac and Fox did

[1] The Court of Claims describes at some length the resistance of the Sac and Fox to the Treaty down to the Black Hawk War of 1832 (App. B, p. 51 n. 6).

not have Indian title to the disallowed acreage (App. B, pp. 69-74). In so doing the Commission ignored completely certain contemporaneous statements made by prominent public officials of the United States in the very context of the issue here in question—i.e., the use and occupancy by the Sac and Fox of the disallowed acreage.

These were impressive persons who made the statements that the Commission disregarded: Thomas Jefferson, President of the United States; Henry Dearborn, Secretary of War; General William Henry Harrison, Governor of the St. Louis District; Captain Meriwether Lewis, on commission from President Jefferson; Lieutenant Zebulon Pike, explorer and ethnographer of the Mississippi Valley.

President Jefferson, in submitting the Treaty of 1804 to the Senate, wrote that "this cession giving us a perfect title to such a breadth of country on the eastern side of the Mississippi, with a command of the Ouisconsin * * * ", and he recited that the Sacs " * * * own the country in the neighborhood of our settlements of Kaskaskia and St. Louis * * * [which includes at least the south part of the disallowed acreage in Illinois and the disallowed acreage along the north boundary of the Missouri river]". (App. C, p. 76). In June of 1804 Secretary Dearborn authorized General Harrison to obtain from the Sacs relinquishment of all pretensions of "a considerable tract" on the northwest side of the Illinois river (*Id.* at 77). In 1802 General Harrison had described the Sacs as a "considerable nation who reside between the Illinois river and the Mississippi" (*Ibid.*), and in 1814, writing of the wars between the Sacs and the Illinois Indians in the late 18th century, he identified the Sacs as the "masters of the country to the north" of the Illinois river (*Id.* at 78). In an extensive report submitted to Congress in 1806, Captain Lewis stated that following the Treaty of 1804 the Sac and the Fox Nation "* * * still claim the land on [the east] side of the [Mis-

sissippi] River, from the mouth of the Ouisconsin to the Illinois River and eastward toward Lake Michigan to what particular boundary I am not informed * * * they sometimes hunt in the country west of them towards the Missouri but their principal hunting is on both sides of the Mississippi from the mouth of the Ouisconsin to the mouth of the Illinois River" (*Id.* at 79-80). Lieutenant Pike, in his *Ethnography of the Mississippi*, described the Saes as hunting "* * * on the Mississippi and its confluent streams from the Illinois to the River Des Iowa; and on the plains west of them which border the Missouri" and the Fox Indians as hunting on "* * * both sides of the Mississippi from the Iowa, below Prairie Des Chiens, to a river of that name [Upper Iowa] above said village." (*Id.* at 80-81).

The Commission ignored these statements and we have no way of knowing why. It made no mention of them either in its opinion or in its findings.[1] Presumably the Commission did not feel these statements were relevant and material because they were made after 1804; possibly the Commission did not regard these public officials as reliable. In any event, the Commission was completely silent about this highly material evidence.[2]

---

[1] The Commission quotes General William Henry Harrison's 1802 letter to the Secretary of War, but only to support the conclusion that the Sac and Fox were not signatories to the Treaty of Greenville (Find. 12; Ct. Cl. App., pp. 10a-11). The Commission also quotes Harrison's 1814 letter but, we should like to point out, misquotes that portion reflecting Sac domination of the Illinois disallowed acreage after the expulsion of the Illinois Indians; viz.: "The Saes remain [sic] masters of the country of [sic] the north." (Find. 17; *Id.* at 23).

[2] We find the Commission's silence passing strange. In *The Sac and Fox Tribe of Indians of Oklahoma* v. *United States*, 5 Ind. Cl. Comm. 367, 372 (1957) the Commission made the following finding:

> "12. The principal hunting country of the Sac and Fox Nation is reported by Meriwether Lewis in 1806 to be:
>
> "'On both sides of the Mississippi, from the mouth of the Wisconsin to the mouth of the Illinois river.'"

This is the very statement of Captain Lewis that the Commission ignored completely in the case at bar!

The Court of Claims, on the other hand, regarded this evidence as relevant and material. "It would have been better" the court wrote, "if the Commission had dealt specifically with the statements, for materials of this kind have a direct bearing on the factual question of aboriginal title." (App. B, p. 58). But then the Court of Claims simply stated that on the record "the Commission was not barred from deeming the statements insufficiently probative," and that the Commission "*could* properly decide that such a late conquest [of the disallowed acreage] would not ripen into aboriginal title by 1804." (emphasis supplied) (*Id.* at 58-59). The point is, however, that the Commission did *not* make a finding that the statements were insufficiently probative nor did it find that these public officials were unreliable.

Section 19 of the Indian Claims Commission Act provides that the final determination of the Commission shall include "its findings of the facts upon which its conclusions are based * * * and * * * statement of its reasons for its findings and conclusions." By failing to make any finding as to this relevant and material evidence, the Commission, and the Court of Claims, have not complied with the manifest intent of Section 19. It is not enough merely to say, as the Court of Claims did, that the Commission "could" have so concluded. Section 19, patterned on a similar section of the Administrative Procedure Act, requires, we submit, that the Commission, in fact, make such a finding. At least one purpose of requiring findings is to enable the reviewing court to determine whether the case was decided on the evidence. See *Saginaw Broadcasting Co.* v. *Federal Communication Commission*, 96 F.2d 554, 560 (D.C. Cir.), *cert. den.*, 305 U.S. 613 (1938); *Snake or Piute Indians* v. *United States*, 125 Ct. Cl. 241, 250, 112 F.Supp. 543, 549 (1953). In the case at bar the Court of Claims could only

speculate—it could not possibly know—whether the Commission considered these statements at all.

The Court of Claims did not make an independent review of the entire record and come to an independent conclusion about the reliability of these statements. It merely said the Commission *could* have found them not to be probative. We submit that this is flatly contradictory to the court's own conception of its role set forth in the *Snake or Piute* case: "Neither should this court undertake to anticipate what the conclusion of the Commission might be as a result of the making of additional findings." *Id.* at 255, 112 F.Supp. at 552. At a later point the Court of Claims summarized that "the Commission was not *compelled* by the record to find that the Sac and Fox had an exclusive and unchallenged claim to the disputed areas * * *" (emphasis supplied) (App. B, p. 61). We conceive this to be a novel—and erroneous—expression of the quantum of proof necessary to support a decision. Under the guiding precedents of this Court, decisions of an administrative tribunal need only be supported by substantial evidence on the whole record. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490 (1951). We can find no adversion to compulsion.

We suggest that the Commission could not find these statements to be insufficiently probative because there was *no* evidence, much less *substantial* evidence, in the record to support such a finding. The statements stood uncontradicted. The first time these assertions were ever challenged was by the Defendant in these proceedings. It is inconceivable to us how the Department of Justice, the Indian Claims Commission or, indeed, the Court of Claims, can, 150 years after the events, determine Indian use and occupancy of the disallowed acreage better than, and in complete disregard of statements by, the administrative and executive

officials of the United States entrusted with making that very determination at the time. In other cases the Court of Claims has insisted that statements like these are entitled to consideration and, indeed, to substantial weight. *Snake or Piute Indians* v. *United States*, 125 Ct. Cl. 241, 260, 112 F.Supp. 543, 555 (1953); *Cf. Crow Tribe of Indians* v. *United States*, 151 Ct. Cl. 281, 290-91, 284 F.2d 361, 367 (1960).

At the very least, the Court of Claims, bothered as it was by the Commission's failure to make specific reference to these statements, should have remanded the case, under Section 20 of the Act, for a finding on the weight to be accorded them. The Court of Claims seems to have disregarded its own procedure and pronouncements in *Snake or Piute*. In that case the court remanded the proceedings to the Commission because of the insufficiency of the findings and for "the making of additional findings which will more completely reflect the relevant facts disclosed by the record." *Snake or Piute Indians* v. *United States*, 125 Ct. Cl. 241, 255, 269, 112 F.Supp. 543, 552, 560 (1953). The court in *Snake or Piute* made specific reference to the fact that no mention was made in either the Commission findings of fact or in its opinion concerning a letter of instructions the court felt should have been considered (*Id.* at 263 n. 10, 112 F.Supp. at 557 n. 10).

Again, we respectfully suggest, that to treat highly material evidence so lightly is to frustrate the broad purposes and intent of the Indian Claims Commission Act which, as a remedial statute, should be liberally construed to accomplish its avowed objective. In *Otoe and Missouria* the Court of Claims manifested keen concern for the Act's broad scope: "* * * we cannot ignore the emphasis placed by Congress on the necessity that these cases be settled finally on the most complete records available to

insure that at some later date the claimants will not again press Congress for special legislation to permit the litigation of matters not fully explored." *Otoe and Missouria Tribe of Indians* v. *United States*, 131 Ct. Cl. 593, 626, 131 F.Supp. 265, 286 (1955).[1] The Court of Claims has shown no such keen concern here.

**3. Length of Time and Title by Conquest.** The Commission held that Petitioners had neither "recognized" nor "aboriginal" title to the disallowed acreage. At the outset, whether an Indian tribe's interest in land is characterized as "recognized" or "aboriginal" title is of no moment under the Indians Claims Commission Act. *Id.* at 609-10, 131 F. Supp. at 276. Indeed, this Court, in another context, has expressed itself on the artificiality of the distinction. *United States* v. *Alcea Band of Tillamooks*, 329 U.S. 40, 51-52 (1946).

The burden of the Commission's opinion and findings as to the Sac and Fox's claim of Indian—i.e., aboriginal—title was that there was not sufficient evidence of exclusive use and occupancy and that other tribes were also in the area. (Find. 17-19; Ct. Cl. App., pp. 20-24). But the Court of Claims injected a new standard:

> "The second, and more important, reason is that these statements do not show that the Sac and Fox had hunted or controlled the disputed areas for *'a long time'* before 1804." (App. B, p. 59).

Nothing in the Commission's opinion or findings indicates that length of time was the basis for its decision. The Court of Claims, accordingly, decided, as a matter of law, that the length of time the Sac and Fox had owned the disallowed

---

[1] In *Otoe and Missouria* the court vacated a determination of the Commission in order to receive highly material evidence adduced in another proceeding.

acreage was insufficient to "ripen into aboriginal title by 1804." (*Ibid.*) In this, we respectfully submit, the Court of Claims has again fallen into error.

We have been unable to find any case under the Indian Claims Commission Act in which length of time, and that alone, has been the criterion for determination of aboriginal Indian title. The Court of Claims cites three of its own cases, each of which posed other and more critical issues.[1] In none of the other cases decided by the Court of Claims under the Act has the issue of Indian title turned entirely on the length of time the Indians occupied the land. This is a case of first impression.

In our view, an Indian tribe could acquire possession of and Indian title to lands at the same time. The only function of time is to serve as a substitute for "recognition" or for deeds of conveyance, recording statutes, and the like. Duration of occupancy, in other words, is merely an alternative to documentary proof; the longer a tribe has exclusively occupied a land area the better, one might say, is the documentary proof. But if the proof were otherwise conclusive, duration of time is not of critical importance.

The Sac and Fox occupied the disallowed acreage in Illinois by forcefully expelling the Illinois Nation. The pos-

[1] In *Snake or Piute Indians* v. *United States*, 125 Ct. Cl. 241, 112 F.Supp. 543 (1953), the questions concerned delimitation of boundaries and the failure of the Commission to consider certain material evidence surrounding the execution of an unratified Treaty in 1868. (*Id.* at 252-70, 112 F.Supp. at 551-60). In the *Quapaw Tribe of Indians* v. *United States*, 128 Ct. Cl. 45, 120 F.Supp. 283 (1954), the tribe had abandoned the area and did not occupy it at the time of taking. (*Id.* at 49, 120 F.Supp. at 286). In *Alcea Band of Tillamooks* v. *United States*, 103 Ct. Cl. 494, 59 F.Supp. 934 (1945), *aff'd*, 329 U.S. 40 (1946), the case arose, not under the Indian Claims Commission Act but under the Special Jurisdiction Act of 1935, and the Court of Claims sat as a trial court. The court merely found that the tribes had held aboriginal title for a long time.

sibility of the nearly extinct Illinois Indians recovering their former lands from the Sac and Fox Nation was nil; they constituted neither threat nor challenge. (Ct. Cl. App., pp. 100-01). The duration of occupancy necessary to substantiate and corroborate Sac and Fox title, therefore, should be short; if Indian title did not vest instantaneously in the Sac and Fox it was only because some passage of time would be necessary to make clear that the warfare was not merely a scalping raid but sought enlargement of the Sac and Fox domain.

In any event, the amount of time necessary to prove Indian title is not an absolute or constant quantity. It must be measured by the circumstances in each case. There must be a determination when use and occupancy commenced, and how long it lasted. The Commission did not come to grips with the time element at all. The Court of Claims, at one point, stated that "a trier of fact *could* properly decide that such a late conquest would not ripen into aboriginal title by 1804," (emphasis supplied) (App. B, p. 59), and, at another point, referred to "the required span of time" (*Id.* at 61). The Commission measured no such span. Thus, the Court of Claims either (a) determined as a matter of law that the Sac and Fox did not own the disallowed acreage for a long enough time, or (b) concluded that the Commission could have found, even though it did not, that the Sac and Fox did not own the disallowed acreage for a long enough time. In either case the Court of Claims has erred and has again disregarded its own precept:

> "The fact of original Indian title in a tribe at an ancient date requires a great deal of proof, and the essential evidentiary facts shown by that proof, insofar as they are relevant, should find their way into carefully prepared findings of fact in support of whatever ultimate finding regarding title is justified thereon." *Snake or Piute Indians* v. *United States*, 125 Ct. Cl. 241, 254, 112 F.Supp. 543, 552 (1953).

The Court of Claims erred in another respect, not unrelated to its error about length of time. It treated title acquired by conquest in a different manner from title acquired in another way. Sac and Fox title to the disallowed acreage is largely based on conquest. Occupancy following conquest, according to the Court of Claims, must be "for a long time."

> "This is as it should be—especially under the Indian Claims Commission Act which is the charter for doing justice between the Indians and the United States. Justice would not be vindicated if a tribe were able to claim a monetary award, on the ground that it was unfairly deprived by the Government of its original ownership of property, where the lands were but recently seized by conquest from another tribe. The rights of aboriginal title must have time to take root, transforming a conquered province into domestic territory. The Claims Commission Act, which seeks to repair damage caused by United States conquest of Indian lands, should not be turned into an engine for creating aboriginal title in a tribe which itself played the role of conqueror but a few years before." (App. B, pp. 59-60).[1]

Nothing in the Act or its legislative history suggests that title acquired by conquest is to be treated differently than title established in any other manner. Nor can we find any support in the reported decisions.

**4. Compensable Interest in the Disallowed Acreage.** Whether or not the Sac and Fox had "recognized" or "Indian" title to the disallowed acreage, they nevertheless did have, we submit, an interest that is compensable under the

---

[1] It strikes us as anomalous that whereas *all* title of the United States, as sovereign, *vis-a-vis* the Indian, stems from conquest, title acquired by conquest by the Indians *inter sese* is in a less favored position. See *Johnson* v. *Mackintosh*, 8 U.S. (Wheat.) 543, 572-91 (1823). Similarly, Defendant bottomed its third defense, which was stricken by the Commission, on the theory of conquest resulting from the Black Hawk War. 3 Ind. Cl. Comm. 395 (1954).

Act. Defendant's witness Stout reluctantly acknowledged that between 1765 and 1804 there were no Indian tribes other than the Sac and Fox Nation "in there [referring to an area including the disallowed acreage] exercising control." (Ct. Cl. App., pp. 126-27).[1] Similarly, in a report received in evidence over Petitioners' objections (Tr. 1449-1451) as Defendant's Exhibit 97, Defendant conceded abandonment by the Illinois Confederacy of the disallowed acreage in Illinois. There is no reference in the report to any tribes other than the Sac and Fox Nation making any use of the disallowed acreage as of 1804 and in the years immediately preceding.[2]

There is no mention of "recognized" title or "aboriginal" title or "Indian" title, or any other kind of title in the Indian Claims Commission Act. These terms have been carried over from earlier decisions and grafted on the Act by the

---

[1] Were it not for the fact that this testimony, developed on cross-examination, is in the nature of an admission against interest, we should be inclined to discount it in the light of Dr. Stout's other testimony. For various of his opinions he relied on the "considerable experience" he gained from visits with the Sac and Fox Indians on their reservation at Tama, Iowa. (Tama is located about 60 miles from Iowa City where Dr. Stout is a professor at the University.) (Tr. 1365). On cross-examination it developed that his actual contact consisted of three whirlwind trips, each for one day or less, one to attend a conference of college professors and research students, another as a paying spectator at the annual public pow-wow, and the third as a chauffeur for a graduate student. He finally admitted that he did not in fact discuss with the Sac and Fox Indians anything pertinent to this proceeding (Tr. 1391-1403).

[2] Dr. Stout was only one of three authors of the anthropological report. He saw the report only twice: once, in Indiana, in the form of preliminary drafts of certain parts, and again, the finished draft in which many changes were made, on a stairway in the Mayflower Hotel four days before the hearing. (Tr. 1140, 1163-1165).

Commission and the Court of Claims. The Act speaks only of "claims" and "lands owned or occupied". We see no reason to transplant those ancient concepts into the soil of new legislation which, avowedly, intended to create new rights, claims, and causes of action. *Otoe and Missouria Tribe* v. *United States*, 131 Ct. Cl. 593, 599, 131 F.Supp. 265, 269 (1955). The rights of the Sac and Fox in the disallowed acreage, whatever their label, constitute a compensable interest under the Act and the Commission should determine what that is

If, contrary to our belief, title was imperfect in 1804 because the lands had not been occupied long enough, then the Sac and Fox had Indian title subject to a defect. The defect was at most nominal. If the Sac and Fox did not have Indian title to the disallowed acreage then alternatively they should be entitled to recover the value of the possessory right they did have and the case should be remanded to the Commission to make such a determination.

The right of occupancy of the Indians, as this Court stated long ago, has always been held sacred. *Minnesota* v. *Hitchcock*, 185 U.S. 373, 387 (1902). We submit that this right is of sufficient dignity to be compensable under the clear intent of the Act.

**5. The Treaty of Greenville.** The Court of Claims and the Commission held that Sac and Fox title to the Cession 50 lands was not "recognized" by the Treaty of Greenville in 1795 (App. B, pp. 45-49, 68-69). This was because the Sac and Fox tribe were not actual signatories to the treaty. We submit that this technical construction of the treaty is erroneous, being violative of the purpose of the treaty, the intent of the Act, and general principles of construction applicable to Indian treaties.

The Treaty of Greenville must be viewed in its setting. General Anthony Wayne was sent out to conclude a treaty establishing a general northwest boundary line between the lands of the United States and the lands of the Indian tribes in the Northwest Territory.[1] The treaty was to do no more than establish that line; it was not to define areas owned by the separate tribes. Part and parcel of the plan was to execute thereafter a series of implementing treaties with each of the Indian tribes to the west of this boundary line for cession of their particular lands. This was to be the task of General Harrison. Such treaties were in fact signed with all of the Indians in the Northwest Territory, both signatory and non-signatory tribes; the Treaty of 1804 purportedly was the implementing treaty as to Sac and Fox lands. If the Treaty of Greenville were to be successful at all, in other words, its terms and provisions would have to apply to all, not just some, of the Indians in the Territory.

Four tribes were not signatories—the Sac and Fox, the Winnebago, the Menominee and the Peoria—but only the Sac and Fox, if the Court of Claims and Commission decisions are to stand, did not in one way or the other receive recognized title to their lands east of the Mississippi by the Treaty of Greenville and its sequels: the Winnebago and Menominee had their titles recognized by treaties in 1825 and 1827; and the Peoria had interests in common with the Kaskaskia Indian tribe which was a Greenville Treaty signatory.[2]

---

[1] This account of the Treaty of Greenville is taken generally from *Miami Tribe of Oklahoma* v. *United States*, 146 Ct. Cl. 421, 427-31 175 F.Supp. 926, 430-32 (1959).

[2] It would be an oddity, to say nothing of an injustice, if the Sac and Fox, as the only ally of the United States in the Northwest Territory in our war for Independence; is the only tribe in that area whose title was not accorded the dignity of recognition by the United States.

The failure of the Sac and Fox to be a signatory was an inadvertence, not deliberate oversight. They had been signatories to the earlier and similar treaty of Fort Harmar (7 Stat. 28); they had attended a council preliminary to the Treaty of Greenville, they had signed preliminary articles, and they had been invited to attend. (S. & F. Ex. 389). They failed to attend the meeting of the Greenville Treaty council because they had misunderstood the time when it would be held (S. & F. Ex. 10). Thus, but for mischance and not design, the Sac and Fox Nation would have been a formal party to the Treaty of Greenville.

The technical construction placed by the Court and Commission on the treaty—i.e., since the Sac and Fox were not signatories, they were not entitled to any benefits—is, under the circumstances, a crabbed one, violative of the treaty itself and the spirit of the Act. It is well recognized that Indian treaties are to be interpreted liberally in favor of the tribes. *Choctaw Nation* v. *United States*, 128 Ct. Cl. 195, 200, 121 F.Supp. 206, 210 (1954).

In the light of these considerations we submit that the Court and Commission erred in holding that the Treaty of Greenville did not accord recognition of Sac and Fox title to the Cession 50 lands.

---

The Indian Claims Commission Act has never been before this Court.[1]

Fundamental questions under the Act are presented by this petition: (i) whether the Commission can disclaim

---

[1] It has been given passing mention by the Court in *United States* v. *Alcea Band of Tillamooks*, 329 U.S. 40 (1946) and *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955). In both cases the Court evinced a liberal view of the Act consonant with its avowed objective, purpose, and intent. 329 U.S. at 49; 348 U.S. at 274, 282.

jurisdiction to declare a treaty ineffective because the Indian representatives were not authorized to sign it; (ii) whether the Court of Claims can refuse to pass on the ineffectiveness of the treaty when its ineffectiveness goes to the very heart of the matter; (iii) whether the Court of Claims, in the absence of reviewing the whole record, can determine that the Commission could disregard certain highly material evidence without making a finding; (iv) whether the Court of Claims can, as a matter of law, hold that use and occupancy of land by the Indian tribe is not compensable under the Indian Claims Commission Act because it was not used and occupied "for a long enough time"; (v) whether title obtained by conquest is to be treated differently than title obtained in another manner; (vi) whether use and occupancy of land by an Indian tribe is a compensable interest under the Act irrespective of its characterization as "recognized" or "aboriginal" title; and (vii) whether the title of the Sac and Fox to the Cession 50 lands was "recognized" by the Treaty of Greenville. As near as we can determine, none of these issues were raised in any of the petitions for writs of certiorari heretofore denied by this Court.

If claims like these are not to be honored, the Indian Claims Commission Act has failed in its objective. The failure, we respectfully submit, does not stem from the Act itself or its legislative history; it stems from restrictive interpretations by the Commission and the Court of Claims. If their interpretations are to stand, the Act will be robbed of its vitality.

## CONCLUSION

For the foregoing reasons it is respectfully requested that this Petition for a Writ of Certiorari to the Court of Claims be granted.

Respectfully submitted,

GEORGE B. PLETSCH AND
ROBERT S. HUNT
231 South La Salle Street
Chicago 4, Illinois

STANFORD CLINTON
134 North La Salle Street
Chicago 2, Illinois

LAWRENCE C. MILLS
29 South La Salle Street
Chicago 3, Illinois

*Counsel for Petitioners*

LOUIS L. ROCHMES
1300 Connecticut Ave.
Washington 6, D. C.
*Of Counsel*

September 5, 1963

## APPENDIX A

[Public Law 726—79th Congress]
[Chapter 959—2nd Session]
[H.R. 4497]

## AN ACT

To create an Indian Claims Commission, to provide for the powers, duties, and functions thereof, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That there is hereby created and established an Indian Claims Commission, hereafter referred to as the Commission.

### § 70a. Jurisdiction; claims considered; offsets and counterclaims

[Sec. 2] The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the

United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after August 13, 1946, shall be considered by the Commission.

All claims under this chapter may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 250 of Title 28; the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to sections 461, 462, 463, 464, 465, 466-470, 471-472, 474, 475, 476-478, and 479 of this title, save expenditures made under section 465 of this title, or for expenditures under any emergency appropriation or allotment made subsequent to

March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award. Aug. 13, 1946, c. 959, § 2, 60 Stat. 1050.

* * *

**§ 70r. Final determinations of Commission**

[Sec. 19] The final determination of the Commission shall be in writing, shall be filed with its clerk, and shall include (1) its findings of the facts upon which its conclusions are based; (2) a statement (a) whether there are any just grounds for relief of the claimant and, if so, the amount thereof; (b) whether there are any allowable offsets, counterclaims, or other deductions, and, if so, the amount thereof; and (3) a statement of its reasons for its findings and conclusions. Aug. 13, 1946, c. 959, § 19, 60 Stat. 1054.

**§ 70s. Review by Court of Claims and Supreme Court**

[Sec. 20] (a) In considering any claim the Commission at any time may certify to the Court of Claims any definite and distinct questions of law concerning which instructions are desired for the proper disposition of the claim; and thereupon the Court of Claims may give appropriate instructions on the questions certified and transmit the same to the Commission for its guidance in the future consideration of the claim.

(b) When the final determination of the Commission has been field with the clerk of said Commission the clerk shall give notice of the filing of such determination to the parties to the proceeding in manner and form as directed by the Commission. At any time within three months from the

date of the filing of the determination of the Commission with the clerk either party may appeal from the determination of the Commission to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination. In similar manner and with like effect either party may appeal to the Court of Claims from any interlocutory determination by the Commission establishing the liability of the United States notwithstanding such determination is not for any reason whatever final as to the amount of recovery; and any such interlocutory appeal shall be taken on or before January 1, 1961, or three months from such interlocutory determination, whichever is later: *Provided*, That the failure of either party to appeal from any such interlocutory determination shall not constitute a waiver of its right to challenge such interlocutory determination in any appeal from any final determination subsequently made in the case. On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting "fair and honorable dealings", where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section. The Court shall promulgate such rules of practice as it may find necessary to carry out the foregoing provisions of this section.

(c) Determinations of questions of law by the Court of Claims under this section shall be subject to review by the

Supreme Court of the United States in the manner prescribed by section 288 of Title 28. Aug. 13, 1946, c. 959, § 20, 60 Stat. 1054, amended Sept. 8, 1960, Pub.L. 86-722, 74 Stat. 829.

S & F EX. 17

Treaty of November 3, 1804 (7 Stat. 84)

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS a treaty between the United States of America and the United Tribes of Sac and Fox Indians was concluded and signed on the third day of November one thousand eight hundred and four, and was duly ratified and confirmed by the President of the United States on the Twenty fifth day of January following, by and with the advice and consent of the Senate, which Treaty is in the words following to wit,

[84]. A TREATY

*Between the United States of America and the United tribes of Sac and Fox Indians.*

ARTICLES of a treaty made at St. Louis in the district of Louisiana between William Henry Harrison, governor of the Indiana territory and of the district of Louisiana, superintendent of Indian affairs for the said territory and district, and commissioner plenepotentiary of the United States for concluding any treaty or treaties which may be found necessary with any of the north western tribes of Indians of the one part, and the chiefs and head men of the united Sac and Fox tribes of the other part.

ARTICLE 1. The United States receive the united Sac and Fox tribes into their friendship and protection, and the said tribes agree to consider themselves under the protection of the United States, and of no other power whatsoever.

ART. 2. The general boundary line between the lands of the United States and of the said Indian tribes shall be as follows, to wit: Beginning at a point on the Missouri river opposite to the mouth of the Gasconade river; thence in a direct course so as to strike the river Jeffreon at the distance of thirty miles from its mouth, and down the said Jeffreon to the Mississippi, thence up the Mississippi to the mouth of the Ouisconsing river [85] and up the same to a point which shall be thirty-six miles in a direct line from the mouth of the said river, thence by a direct line to the point where the Fox river (a branch of the Illinois) leaves the small lake called Sakaegan, thence down the Fox river to the Illinois river, and down the same to the Mississippi. And the said tribes, for and in consideration of the friendship and protection of the United States which is now extended to them, of the goods (to the value of two thousand two hundred and thirty-four dollars and fifty cents) which are now delivered, and of the annuity hereinafter stipulated to be paid, do hereby cede and relinquish forever to the United States, all the lands included within the above-described boundary.

ART 3. In consideration of the cession and relinquishment of land made in the preceding article, the United States will deliver to the said tribes at the town of St. Louis or some other convenient place on the Mississippi yearly and every year goods suited to the circumstances of the Indians of the value of one thousand dollars (six hundred of which are intended for the Sacs and four hundred for the Foxes) reckoning that value at the first cost of the goods in the city or place in the United States where they shall be procured. And if the said tribes shall hereafter, at an annual delivery of the goods aforesaid, desire that a part of their annuity should be furnished in domestic animals, implements of husbandry and other utensils convenient for

them, or in compensation to useful artificers who may reside with or near them, and be employed for their benefit; the same shall at the subsequent annual delivery be furnished accordingly.

ART. 4. The United States will never interrupt the said tribes in the possession of the lands which they rightfully claim, but will on the contrary protect them in the quiet enjoyment of the same against their own citizens and against all other white persons who may intrude upon them. And the said tribes do hereby engage that they will never sell their lands or any part thereof to any sovereign power, but the United States, nor to the citizens or subjects of any other sovereign power, nor to the citizens of the United States.

ART. 5. Lest the friendship which is now established between the United States and the said Indian tribes should be interrupted by the misconduct of individuals, it is hereby agreed that for injuries done by individuals no private revenge or retaliation shall take place, but, instead thereof, complaints shall be made by the party injured to the other —by the said tribes or either of them to the superintendant of Indian affairs or one of his deputies, and by the superintendant or other person appointed by the President, to the chiefs of the said tribes. And it shall be the duty of the said chiefs upon complaint being made as aforesaid to deliver up the person or persons against whom the complaint is made, to the end that he or they may be punished agreeably to the laws of the state or territory where the offence may have been committed; and in like manner if any robbery, violence or murder shall be committed on any Indian or Indians belonging to the said tribes or either of them, the person or persons so offending shall be tried, and if found guilty, punished in the like manner as if the injury had been done to a white man. And it is further

agreed, th the chiefs of the said tribes shall, to the utmost of their power exert themselves to recover horses or other property which may be stolen from any citizen or citizens of the United States by any individual or individuals of their tribes, and the property so recovered shall be forthwith delivered to the superintendant or other person authorised to receive it, that it may be restored to the proper owner; and in cases where the exertions of the chiefs shall be ineffectual in recovering the property stolen as aforesaid, if sufficient proof can be [86] obtained that such property was actually stolen by any Indian or Indians belonging to the said tribes or either of them, the United States may deduct from the annuity of the said tribes a sum equal to the value of the property which has been stolen. And the United States hereby guarantee to any Indian or Indians of the said tribes a full indemnification for any horses or other property which may be stolen from them by any of their citizens; provided that the property so stolen cannot be recovered and that sufficient proof is produced that it was actually stolen by a citizen of the United States.

ART. 6. If any citizen of the United States or other white person should form a settlement upon lands which are the property of the Sac and Fox tribes, upon complaint being made thereof to the superintendant or other person having charge of the affairs of the Indians, such intruder shall forthwith be removed.

ART. 7. As long as the lands which are now ceded to the United States remain their property, the Indians belonging to the said tribes, shall enjoy the privilege of living and hunting upon them.

ART. 8. As the laws of the United States regulating trade and intercourse with the Indian tribes, are already extended to the country inhabited by the Saukes and Foxes,

and as it is provided by those laws that no person shall reside as a trader in the Indian country without a license under the hand [and] seal of the superintendant of Indian affairs, or other person appointed for the purpose by the President, the said tribes do promise and agree that they will not suffer any trader to reside amongst them without such license; and that they will from time to time give notice to the superintendant or to the agent for the tribes of all the traders that may be in their country.

ART. 9. In order to put a stop to the abuses and impositions which are practiced upon the said tribes by the private traders, the United States will at a convenient time establish a trading house or factory where the individuals of the said tribes can be supplied with goods at a more reasonable rate than they have been accustomed to procure them.

ART. 10. In order to evince the sincerity of their friendship and affection for the United States and a respectful deference for their advice by an act which will not only be acceptable to them but to the common Father of all the nations of the earth: the said tribes do hereby solemnly promise and agree that they will put an end to the bloody war which has heretofore raged between their tribes and those of the Great and Little Osages. And for the purpose of burying the tomahawk and renewing the friendly intercourse between themselves and the Osages, a meeting of their respective chiefs shall take place, at which under the direction of the above-named commissioner or the agent of Indian affairs residing at St. Louis, an adjustment of all their differences shall be made and peace established upon a firm and lasting basis.

ART. 11. As it is probable that the government of the United States will establish a military post at or near the mouth of the Ouisconsing river: and as the land on the

lower side of the river may not be suitable for that purpose, the said tribes hereby agree that a fort may be built either on the upper side of the Ouisconsing or on the right bank of the Mississippi, as the one or the other may be found most convenient; and a tract of land not exceeding two miles square shall be given for that purpose. And the said tribes do further agree, that they will at all times allow to traders and other persons travelling through their country under the authority of the United States a free and safe passage for themselves and their property of every description. And for such [87] passage they shall at no time and on no account whatever be subject to any toll or exaction.

ART. 12. This treaty shall take effect and be obligatory on the contracting parties as soon as the same shall have been ratified by the President by and with the advice and consent of the Senate of the United States.

IN TESTIMONY WHEREOF, The said William Henry Harrison, and the chiefs and head men of the said Sac and Fox tribes have hereunto set their hands and affixed their seals. Done at Saint Louis, in the district of Louisiana, on the third day of November, one thousand eight hundred and four, and of the independence of the United States, the twenty-ninth.

(Signed)

Layouvois, or Laiyuwa,
Pashepaho, or the Giger,
Quiashquame, or Jumping Fish,

William Henry Harrison,
Outchequaha, or Sun Fish,
Hahshequaxhiqua, or the Bear.

In presence of (the words "a branch of Illinois," in the third line of the second article, and the word "forever", in the fifth line of the same article, being first interlined,) Wm. Prince, Secretary to the Commissioner. John Griffin, one of the Judges of the Indiana Territory. J. Bruff, Major Art'ry U. S. Amos Stoddard, Capt. corps of Artillerists. P. Chouteau, Agent de la Traité Louisiana pour le Départmant, Innaugé. Ch. Gratiot. Aug. Chouteau. Vigo. S. Warrell, Lt. U. S. Artillery. D. Delaunay. Sworn Interpreters, Joseph Barron, Hypolite Bolon.

To the Indian names are subjoined a mark and seal.

---

## ADDITIONAL ARTICLE

It is agreed that nothing in this treaty contained, shall affect the claim of any individual or individuals who may have obtained grants of land from the Spanish government, and which are not included within the general boundary line laid down in this treaty, provided that such grant have at any time been made known to the said tribes and recognized by them.

Now therefore to the end that the said Treaty may be observed and performed with good faith on the part of the United States, I have caused the premises to be made public, and I do hereby enjoin and require all persons bearing office, civil or military within the United States, and all others, citizens or inhabitants thereof, or being within the

same, faithfully to observe and fulfil the said Treaty and every clause and article thereof.

In Testimony whereof, I have caused the Seal of the United States to be affixed to these presents, and signed the same with my hand.

[SEAL] Done at the City of Washington the Twenty first day of February in the year of our Lord one thousand Eight hundred and five, and of the Independence of the United States of America, the Twenty Ninth.

T. W. JEFFERSON

By the President,

JAMES MADISON,
Secretary of State.

S & F EX. 9

Treaty of Greenville
(7 Stat. 49, August 3, 1795)

GEORGE WASHINGTON

PRESIDENT OF THE UNITED STATES
OF AMERICA

TO ALL TO WHOM THESE PRESENTS SHALL
COME, GREETING.

WHEREAS a Treaty of Peace and Friendship between the United States of America and the Tribes of Indians called the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas, Putawatimes, Miamis, Eel River, Weea's, Kickapoos, Piankashaws, and Kaskaskias, was made and concluded on the Third day of August one thousand seven hundred and ninety five by Anthony Wayne, Major General Commanding the Army of the United States, duly authorized thereto, on the one part, and the Sachems and war chiefs of the before mentioned Nations and Tribes of Indians whose names are thereunto signed on the other part; which Treaty is in the form and words following viz:

* * *

ARTICLE III

The general boundary line between the lands of the United States, and the lands of the said Indian tribes, shall begin at the mouth of Cayahoga river, and run thence up the same to the portage between that and the Tuscarawas branch of the Muskingum; thence down that branch to the crossing place above Fort Lawrence; thence westerly to a fork of that branch of the great Miami river running into the Ohio, at or near which fork stood Loromie's store, and where commences the portage between the Miami of the

Ohio, and St. Mary's river, which is a branch of the Miami, which runs into Lake Erié; thence a westerly course to Fort Recovery, which stands on a branch of the Wabash; then south-westerly in a direct line to the Ohio, so as to intersect that river opposite the mouth of Kentucke or Cuttawa river, And in consideration of the peace now established; of the goods formerly received from the United States; of those now to be delivered, and of the yearly delivery of goods now stipulated to be made hereafter, and to indemnify the United States for the injuries and expences they have sustained during the war; the said Indian tribes do hereby cede and relinquish forever, all their claims to the lands lying eastwardly and southwardly of the general boundary line now described; and these lands, or any part of them, shall never hereafter be made a cause of pretence, on the part of the said tribes or any of them, of war or injury to the United States, or any of the people thereof.

[50] And for the same considerations, and as an evidence of the returning friendship of the said Indian tribes, of their confidence in the United States, and desire to provide for their accommodation, and for that convenient intercourse which will be beneficial to both parties, the said Indian tribes do also cede to the United States the following pieces of land; to wit.

* * *

(14.) One piece of land six miles square at the mouth of Chikago river emptying into the southwest end of Lake Michigan, where a fort formerly stood. (15.) One piece twelve miles square at or near the mouth of the Illinois river, emptying into the Mississippi. (16.) One piece six miles square at the old Piorias fort and village, near the south end of the Illinois lake on said Illinois river: And whenever the United States shall think proper to survey and mark the boundaries of the lands hereby ceded to them,

they shall give timely notice thereof to the said tribes of Indians, that they may appoint some of their wise chiefs to attend and see that the lines are run according to the terms of this treaty.

* * * *

Again from the mouth of Chikago, to the commencement of the portage, between that river and the Illinois, and down the Illinois river to the Mississippi, also from Fort Wayne along the portage aforesaid which leads to the Wabash, and then down the Wabash to the Ohio. And the said Indian tribes will also allow to the people of the United States the free use of the harbours and mouths of rivers along the lakes adjoining the Indian lands, for sheltering vessels and boats, and liberty to land their cargoes where necessary for their safety.

ARTICLE IV.

In consideration of the peace now established and of the cessions and relinquishments of lands made in the preceding article by the said tribes of Indians, and to manifest the liberality of the United States, as the great means of rendering this peace strong and perpetual; the United States relinquish their claims to all other Indian lands northward of the river Ohio, eastward of the Mississippi, and westward and southward of the Great Lakes and the waters uniting them, according to the boundary line agreed on by the United States and the king of Great-Britain, in the treaty of peace made between them in the year 1783. But from this relinquishment by the United States, the following tracts of land, are explicitly excepted. 1st. The tract of one hundred and fifty thousand acres near the rapids of the river Ohio, which has been assigned to General Clark, for the use of himself and his warriors. 2d. The post of St. Vincennes on the river Wabash, and the lands adjacent, of which the Indian title has been extinguished. 3rd. The lands at

all other places in possession of the French people and other white settlers among them, of which the Indian title has been extinguished as mentioned in the 3d article; and 4th. The post of fort Massac towards the mouth of the Ohio. To which several parcels of land so excepted, the said tribes relinquish all the title and claim which they or any of them may have.

* * *

## ARTICLE V.

To prevent any misunderstanding about the Indian lands relinquished by the United States in the fourth article, it is now explicitly declared, that the meaning of that relinquishment is this: The Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States; and until such sale, the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same. And the said Indian tribes again acknowledge themselves to be under the protection of the said United States and no other power whatever.

* * *

## APPENDIX B

## IN THE UNITED STATES COURT OF CLAIMS

Appeal No. 1-61

(Decided April 5, 1963)

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, ET AL. v. THE UNITED STATES

---

*George B. Pletsch* for the appellants. *Dallstream, Schiff, Hardin, Waite & Dorschel, Pritzker, Pritzker & Clinton, Stanford Clinton, Lawrence C. Mills, Louis L. Rochmes,* and *Dempsey, Mills & Casey* were on the briefs.

*David M. Marshall,* with whom was *Assistant Attorney General Ramsey Clark,* for the appellee.

OPINION

DAVIS, *Judge,* delivered the opinion of the court:

This is another interlocutory appeal on behalf of a claimant from a determination by the Indian Claims Commission that the tribe did not possess recognized title to the lands in suit and had aboriginal title only to a part of those lands. 7 Ind. Cl. Comm. 675, Docket 83 (1959).[1] By the Treaty of November 3, 1804, 7 Stat. 84, the Sac and Fox Tribes ceded to the United States a large area extending north and south along the Mississippi and Illinois Rivers in southwestern Wisconsin, western Illinois, and northeastern Missouri; most of the tract lay immediately east of the Mississippi, but the southerly portion in Missouri was situated west of

[1] See also *Minnesota Chippewa Tribe, et al. v. United States,* Appeal No. 11-61, Ct. Cl., decided this day.

the river between it and the Missouri. In Royce's numbering, the area is known as Cession or Area 50. Appellants' suit under the Indian Claims Commission Act is for increased compensation for a major part (but not all) of Area 50. They claim here, as they did below, that the Sac and Fox had both a title recognized by the United States and also aboriginal title through exclusive use and occupancy. We affirm the Commission which wholly rejected the argument of recognized title and eliminated two substantial areas from the aboriginal ownership it accorded the Sac and Fox.

RECOGNIZED TITLE

The general standards for determining recognition are treated in our opinion in *Minnesota Chippewa Tribe, et al. v. United States*, Appeal No. 11-61, also decided this day, slip op. 7-9. Congress, acting through a treaty or statute, must be the source of such recognition, and it must grant legal rights of permanent occupancy within a sufficiently defined territory. Mere executive "recognition" is insufficient, as is a simple acknowledgment that Indians physically lived in a certain region. There must be an intention to accord or recognize a *legal* interest in the land.

Three treaties are woven into appellants' claim of such recognition. The first was the Fort Harmar Treaty of January 9, 1789, 7 Stat. 28, with six tribes including the Sacs. The main objective of this agreement was to renew and confirm the boundary line in Ohio which had been established some four years before in 1785 by the Treaty of Fort McIntosh, 7 Stat. 16, between four of these tribes—*not* including the Sac—and the United States. The provisions of the Fort Harmar Treaty directly relating to boundary and land (Articles I-IV, IX) do not refer to or involve the Sac Nation[1] but only the "said nations" (or "those nations")

[1] The Fox did not participate at all.

which had signed the earlier treaty of 1785. As signatories, the Sac were concerned only with the other portions of the Fort Harmar Treaty, the articles as to trading, cessation of hostilities, delivery of criminals, and horse-stealing. This is shown by Article XIV, containing the sole mention of the Sac, which declares that the United States "do *also* receive into their friendship and protection, the nations of the Pattiwatimas and Sacs; and do hereby establish a league of peace and amity between them respectively; and all the articles of this treaty, *so far as they apply to these nations*, are to be considered as made and concluded in all, and every part, expressly with them and each of them" (emphasis added). The reference to the other articles of the treaty "so far as they apply to these nations" indicates plainly that the Sac were not affected by the boundary provisions and the land cessions, but only by the other phases. There was therefore no acknowledgment or recognition of Sac ownership of any defined territory.

The next treaty—on which the appellants primarily rely—was the Treaty of Greenville of August 3, 1795, 7 Stat. 49, already considered at length by this court in *The Miami Tribe of Oklahoma*, 146 Ct. Cl. 421, 427-431, 175 F. Supp. 926, 929-931 (1959). In 1794, "General Anthony Wayne was appointed a commissioner to negotiate a treaty with the hostile tribes of the Northwest Territory. In his treaty instructions it was emphasized that he should attempt to bring about an agreement concerning a dividing boundary line between lands used and occupied by the Indian tribes in the territory and the lands which belonged to the United States. He was also instructed to establish the boundary lines between the lands owned by the separate tribes in the territory. He was authorized to guarantee to the Indian tribes the right to the soil in the lands owned by them as against any citizens or inhabitant of the United States. During the

course of the negotiations" with twelve tribes "it became apparent that it would not at that time be possible to persuade the tribes to agree to definite boundaries between their separate areas of occupation and accordingly his treaty instructions were altered to permit him to make a single treaty with all of the tribes establishing the overall boundaries of the land owned by all of them without defining inter-tribal boundaries. The treaty was negotiated at Greenville and executed on August 3, 1795" (146 Ct. Cl. at 427-428, 175 F. Supp. at 930). This treaty established a "general boundary line between the lands of the United States, and the lands of the said Indian tribes," beginning at the mouth of the Cuyahoga River at Lake Erie (where Cleveland is now situated), running across Ohio to what is now Indiana, then southwest to the Ohio River on the border between Indiana and Kentucky to a point about 25 miles west of the Ohio line. The Indians ceded all claims to the land east and south of that line; the United States relinquished, in consideration, all claims to Indian lands (with defined exceptions) north of the Ohio River, east of the Mississippi River, and west and south of the Great Lakes and the waters uniting them. "Although the Treaty of Greenville did not establish boundaries between the lands of the various signatory tribes, the tribal representatives to the treaty understood that the United States was dealing with each tribe independently of the others and that boundaries would be established as between the various tribes by future negotiations" (146 Ct. Cl. at 431, 175 F. Supp. at 931). This was done in the following years (146 Ct. Cl. at 431-438, 175 F. Supp. at 931-936).

In *Miami Tribe, supra*, the Commission and this court held that the Treaty of Greenville, together with the "follow-up" treaties, did accord recognition of the legal right and title *of the signatory tribes* to the lands relinquished by the United States. But neither the Sacs nor the Foxes

signed the treaty nor were they present at the negotiations. The general rule is, of course, that an Indian tribe obtains no legal rights from a treaty to which it is not a contracting party. See *The Yuchi Tribe of Indians* v. *United States*, 136 Ct. Cl. 433, 448, 145 F. Supp. 206, 214 (1956), *cert. denied*, 352 U.S. 1016 (1957); *Potawatamie Indians* v. *United States*, 27 Ct. Cl. 403, 419 (1892). Appellants contend, however, that the Federal Government must have intended, by the Greenville Treaty, to recognize the right of *all* Indian tribes in that area to *all* the land on the Indian side of the general boundary, and therefore to acknowledge the rights of the Sacs and Foxes even through they were not present and did not sign as contracting parties.

We cannot agree with this strained interpretation of the treaty. Under its terms, only the named tribes were to be bound or benefited. The preamble recites that the federal representative met with the agents of "the *said* tribes of Indians" (referring to the twelve signatory tribes) and agreed upon a treaty which, when ratified, was to be binding on the United States "and the *said* Indian tribes" (emphasis added). The reconfirmed boundary was designated as the line "between the lands of the United States, and the lands of the *said* Indian tribes"; the ceded lands were given up by the "*said* Indian tribes"; certain rights of passage for United States citizens were allowed by "the *said* Indian tribes"; trade was to be opened with "the *said* Indian tribes"; the United States and "the *said* Indian tribes" forbade private revenge or retaliation; and previous treaties between the United States and "the *said* Indian tribes, or any of them" were to become void (emphasis added). The United States, as its major concession, relinquished territorial claims "in consideration of the peace now established and of the cessions and relinquishments of lands made * * * by the *said* tribes of Indians * * *"; and a payment was made "to the *said* Indian tribes," with specified annual allowances to be

paid in the future to the twelve signatories by name (emphasis added).

It was quite possible for the Federal Government thus to treat differently the various tribes and tribal lands on the Indian side of the general line, depending upon whether the particular tribe entered into a settlement or came to terms with the United States (at Greenville and later). Indeed, it would be natural for the United States to bind itself only to those tribes which obligated themselves to the United States. We find nothing in the negotiations, or the treaty instructions, or the general contemporaneous references to the Greenville Treaty as confirming the Indian ownership of Indian lands (in the collective sense) on their side of the line to cause us to modify our statement in *Miami Tribe* that "the trial representatives to the [Greenville] treaty understood that the United States was dealing with each tribe independently of the others and that boundaries would be established as between the various tribes by future negotiations" (146 Ct. Cl. at 431, 175 F. Supp. at 931). The other tribes were representing themselves, and not acting on behalf of the Sacs and Foxes, in signing the treaty. Nor were the latter third party beneficiaries of the compact, or somehow brought within its reach by affiliation or association. On the contrary, the contemporary understanding seems clearly to have been that the Sac and Fox Tribes were wholly outside the benefits of Greenville. Governor Harrison of the Indian Territory reported to the Secretary of War in 1802 that the Sacs "were not included in the treaty of Greenville" but "are now extremely desirous to be put on a footing with the other tribes, and receive an annual present, * * *." Just as the Sacs did not receive an annual present under the Greenville treaty because they were not a signatory, so they did not obtain recognition of their title. As Harrison and the Indians both knew, a further treaty would be required

to give the Sacs (and their allies) any benefits or rights comparable to those granted at Greenville.

The third treaty appellants invoke is that of November 3, 1804, 7 Stat. 84, which ceded the lands for which higher compensation is now sought. This compact fixed "the general boundary line between the lands of the United States and of the said Indian tribes", and the tribes ceded and relinquished to the United States "all the lands included within the above-described boundary." Article 7 provided that "as long as the lands which are now ceded to the United States remain their [*i.e.*, the United States'] property, the Indians belonging to the said tribes, shall enjoy the privilege [sic] of living and hunting upon them." But, significantly, the treaty did not contain *as to the ceded lands* any equivalent of Article V of the Greenville Treaty (on which the court placed great stress in *Miami Tribe*, providing that the signatory tribes were to be protected in the quiet enjoyment of the Indian lands relinquished by the United States "so long as they [the tribes] please." [3] There being no prior recognition of the Sac and Fox title and no indication of such recognition in the 1804 Treaty itself, that treaty must be viewed as no more than a cession agreement which, in order to extinguish all *claims*, reflected in its wording and coverage the broadest assertions of the Indians to the ceded territory but did not acknowledge or recognize that those claims had any substance.[4] See *Quapaw Tribe* v. *United States*, 1 Ind. Cl. Comm. 469, 485 (1951), affirmed 128 Ct. Cl. 45, 49-50, 120 F. Supp. 283, 286 (1954); *The Iowa Tribe of the Iowa Reservation, etc.* v. *United States*, 6 Ind. Cl. Comm. 464,

[3] Article 4 of the 1804 Treaty did contain a comparable provision as to the Sac and Fox lands *retained* by the tribes after the 1804 cession; this provision applied to lands "rightfully" claimed.

[4] Cf. *Minnesota Chippewa Tribe, et al.* v. *United States*, Appeal No. 11-61, Ct. Cl., decided this day, slip op. 9.

501 (1958). Appellants apparently assume that "recognition", or "acknowledgment" necessarily follow from an acceptance by the United States of the bare fact that the particular Indians dwelt or hunted, or claimed to dwell or hunt, in the area at that time. But there must be another indispensable element before recognition is had. The Congress must affirmatively intend to grant the right to occupy and use the land permanently. "By 'recognition', the courts have meant that Congress intended to acknowledge, or if one prefers, to grant, to Indian tribes rights in land which were in addition to the Indians' traditional use and occupancy rights exercised only with the permission of the sovereign." *The Miami Tribe of Oklahoma* v. *United States*, *supra*, 146 Ct. Cl. at 445, 175 F. Supp. at 940. As this statement shows, in this context "acknowledgment" is a synonym for "recognition" (see also 146 Ct. Cl. at 439, 175 F. Supp. at 936), and both require some affirmative grant or acceptance of more-than-permissive rights. Appellants can point to nothing affording the Sac and Fox Tribes such recognition or acknowledgment of legal rights in the area ceded by them in the 1804 Treaty.[5]

### THE ISSUE OF THE VALIDITY OF THE 1804 TREATY

Although they stand squarely on the 1804 Treaty as recognizing the Tribes' title, appellants nevertheless urge that the Treaty was invalid because not negotiated or signed by proper representatives of the Sac and Fox. At a pre-trial hearing the defendant formally stipulated that the Treaty "has no validity" of itself but also declared that later

[5] Appellants, by disavowing any claim to parts of Area 50 (all of which was ceded by the 1804 Treaty), have themselves indicated that the 1804 Treaty did not, in itself, confer recognition, and that they must either rely on earlier treaties or on aboriginal title. Appellants' brief on appeal (p. 10, fn. 1) states: "The Treaty of 1804 included lands which the Sac and Fox Nation did not, as far as we can determine, own in 1804."

treaties "validated said treaty of 1804."[6] The Commission, correctly refusing to be bound by a stipulation on an issue of law (*Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281, 289 (1917)), held that the validity of a properly executed treaty is not open to judicial inquiry even under the Indian Claims Commission Act, and that the Treaty must be deemed fully valid.[7] The parties have argued the point extensively. It seems to us, however, quite unnecessary to decide the question in this case. The only consequence appellant seriously urges as turning on the Treaty's invalidity is that, if it is void, the land ceded would not have been acquired by the United States in 1804 but only at a later time (under post-1804 treaties or when actually disposed of to settlers) and would therefore have to be valued as of that subsequent date. But that conclusion would not follow even if we deemed the 1804 Treaty valid. If the treaty were invalid, the United States would have unilaterally deprived the Sac and Fox of their lands in 1804, not later; that would

---

[6] The Sac and Fox resented the 1804 Treaty as foisted upon them by a few unauthorized chiefs who obtained far too little compensation for the ceded territory. They complained to federal officials and urgently sought better terms. In the War of 1812 some of the Sacs sided with the British. Although the Tribes entered into treaties in 1815 and 1816 confirming the 1804 compact (7 Stat. 134, 135, 141), the matter was not put to rest. Later treaties in 1824 and 1825 (7 Stat. 229, 272), primarily involving other lands, again attempted to settle in favor of the United States the status of the areas ceded in 1804. The feeling of injury subsisted, however, and a part of the tribes continued to refuse to leave the ceded lands. In 1832 armed conflict broke out with settlers and militia in Illinois. The Indians were led by the Sac chief Blackhawk, and the episode is known as Blackhawk's War, in which the Sac and Fox were finally defeated. It was in this conflict that Abraham Lincoln, as an elected captain of volunteers, had his pre-taste of armed hostility.

[7] Putting to one side the effect of the Claims Commission Act, there is much authority that the courts cannot inquire whether a duly promulgated treaty with the Indians was validly consummated by or on behalf of the tribe. See, *e.g.*, *Fellows v. Blacksmith*, 19 How. 366, 372 (1856); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567-68 (1903); *United States v. Minnesota*, 270 U.S. 181, 201-202 (1926). Cf. *Baker v. Carr*, 369 U.S. 186, 215-16 (1962).

be the date of definitive taking, for there could have been little doubt in the minds of the Indians that the United States was continually asserting full ownership of the area after the Treaty.[8] On this assumption of a unilateral taking, appellants' claim under Section 2 of the Indian Claims Commission Act, 25 U.S.C. §70a, would be one "arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant." The proper valuation date would, as we have said, be the date of deprivation, November 1804. It follows that, whether or not the Treaty was validly negotiated, the taking or acquisition by the United States, and the loss by the Indians, occurred in that year. It makes no difference to this proceeding whether the Treaty was invalid at its inception or whether it is now revised (under the Claims Commission Act) on the ground of unconscionable consideration. In either event the lands found to have been held by the Sac and Fox are to be valued as of 1804, and not thereafter.

ABORIGINAL TITLE

The remaining question is whether the Indian Claims Commission committed error in holding that appellants, showing no recognized title, also failed to prove aboriginal title to a part of the portion of Cession 50 claimed in this proceeding. The whole area claimed is a relatively narrow elongated tract running north-south along the Mississippi River from about Prairie du Chien, Wisconsin, on the north, to near St. Louis, Missouri, on the south. The decision below sustained the claimant's aboriginal title to the northern part of this tract as well as to most of the southern portion,

[8] By the Act of March 3, 1805, 2 Stat. 343, Congress authorized the ceded lands to be thrown open for sale as public lands. See also footnote 6, *supra*.

but held against the appellants as to the large segment in the middle, as well as a smaller segment in the very south. The large middle area lies between the Illinois and Mississippi Rivers (on the east side of the latter), and the smaller sector lies immediately north of the Missouri River on the west side of the Mississippi. The entire area claimed for the Sac and Fox in this proceeding covers about 9,800,000 acres; of this, about 4,000,000 was awarded below and the remaining 5,800,000 (consisting of a 5,000,000 acre tract and an 800,000 acre tract) were held not to have been owned by the Sac and Fox. The defendant points out that in other proceedings, which are still not final, the Commission has awarded the Sac and Fox large areas on the west side of the Mississippi in Iowa and Missouri, totaling about 18,000,000 acres.[9] The only relevance of this fact—and it is relevant for this purpose—is to show that the two non-contiguous sectors of Area 50 awarded below are not isolated but form the eastern and southern parts of a continuous expanse of territory (in Wisconsin, Illinois, Iowa, and Missouri) determined by the Commission to have belonged to the Sac and Fox; on the other hand, the sectors of Area 50 omitted by the Commission do not make gaps in otherwise solid Sac and Fox Territory (as the Commission has found it to be) but, rather, form marked indentations along the edges. Appellants urge, of course, that if the omitted sectors were added the border of these Indians' region would be less indented and more symmetrical.

The adverse factual determinations as to the unawarded tracts are challenged on two major grounds: (a) the Commission erroneously rejected, because the documents came after the 1804 Treaty, evidence tending to prove that the Sac and Fox occupied these areas prior and up to 1804; and (b)

[9] These proceedings have not come to this court and can still do so after final determinations are made.

the Commission's findings are not supported by substantial evidence in the record as a whole. If the Commission had followed the rule, as a matter of law or of policy, of refusing to consider any post-1804 materials as bearing on pre-1804 occupancy, we would be required to reverse. Post-treaty materials can often shed light on the state of affairs prior to the treaty. Their weight may depend upon their closeness in time to the critical date or upon the nearness of the events they describe, but there is and can be no general rule warranting the fact-finder in disregarding en masse all such evidence. They must be considered and cannot be discarded out of hand. We know that in other cases the Commission has correctly taken post-treaty evidence into account in deciding a treaty or a pre-treaty issue. See, *e.g.*, *The Sac and Fox Tribe* v. *United States*, Appeal No. 10-61, Ct. Cl., decided Nov. 7, 1962, slip op., 5-6 (involving another Sac and Fox claim). The difficulty with appellants' argument is that, as we read the findings and opinion below, the Commission here followed the same pattern and did not disregard the post-Treaty materials (although it gave them less weight than appellants think they merit). Nowhere does the Commission say that it is refusing to consider post-1804 materials, and several of its findings specifically refer to such evidence. We cannot say that the Commission failed to *consider* materials which came after the Treaty of 1804 simply because it thought that evidence unpersuasive or overborne by other data.

The issue then narrows to whether the Commission's factual findings and determinations on aboriginal ownership of the two excluded segments are sustainable. From the findings and opinion we gather that the Commission based the phase of its determination which was favorable to appellants [10] on proof that the Sac and Fox lived and hunted in

[10] The Government has taken no appeal, at this time, from this holding.

the awarded sections of Area 50 for a long time prior to 1804; conversely, the Commission's refusal to find the required use and occupancy in the sections involved in this appeal was mainly based on its view that (a) there was too slight proof of Sac and Fox villages and occupancy in these areas, and also that (b) any Sac and Fox occupancy of the omitted sectors, through living and hunting, was too recent for acquisition of aboriginal ownership since these Indians had entered and driven out other Indians (who had previously possessed the areas) no earlier than the latter part of the 18th century. To be accepted under the Indian Claims Commission Act, aboriginal title must rest on actual, exclusive,[1] and continuous use and occupancy "for a long time" prior to the loss of the property. See *The Snake or Piute Indians* v. *United States*, 125 Ct. Cl. 241, 254, 112 F. Supp. 543, (1953); *The Quapaw Tribe of Indians* v. *United States*, 128 Ct. Cl. 45, 49, 120 F. Supp. 283, 285 (1954); *Alcea Band of Tillamooks* v. *United States*, 103 Ct. Cl. 494, 557, 59 F. Supp. 934, 965 (1945), affirmed 329 U.S. 40 (1946). Each of these components must be shown by adequate proof.

To sustain their attack on the adverse findings and determination as lacking substantial support, appellants emphasize three main classes of materials in this record: first, documentary references to Sac and Fox villages and hunting in the excluded sectors, particularly the larger segment between the Illinois and Mississippi Rivers; second, general statements by officials that the Sac and Fox occupied or hunted the areas (especially that between the Illinois and the Mississippi) prior to the 1804 Treaty; and, third, historical data tending to show (appellants say) the non-existence of other tribes in the area and Indian recognition of this territory as belonging to the Sac and Fox. We canvass these points in turn.

---

[1] Except where two or more tribes or groups inhabit a defined area in joint and amicable possession.

Although the Commission determined that no Sac and Fox village of any significance can be found within the larger excluded area prior to 1804, appellants insist that they have overwhelmingly proved that there were four such villages in that sector, particularly a Henderson Creek village referred to by Lt. Zebulon Pike as "the largest Sac village" (in his notes of his travels up the Mississippi in August 1805). But the Commission was not compelled to accept the existence of these communities, in or before 1804, as proved by the record. With respect to the alleged Henderson Creek village, for instance, there are adequate reasons to doubt the claim—which is largely based on Lt. Pike's account. Pike's reference was admittedly hearsay since he simply says that on August 23, 1805, he was "informed" by unnamed visitors to his boat on the Mississippi "that the largest Sac village was about 21/2 miles out on the prairies"; the "Henderson Creek village" could not have been "the largest Sac village" since at that time the largest village (by far) was undoubtedly Saukenuk on the Rock River some 75 miles to the north in an area awarded by the ruling below to the Sac and Fox; and the well-known Sac and Fox Indian agent Thomas Forsyth referred in 1824 to the Henderson Creek location as the site of a "small Sauk [Sac] village * * * built in May" *1824* (twenty years after the cession).[12] The issue for us, of course, is not where the preponderance of the evidence lies, but whether there is substantial evidence in the record as a whole to support the Commission's adverse finding as to this village. Applying that standard, we cannot say that the Commission had to accept appellants' evidence on this point, subject as it was to so great a possibility of error. The same is true as to three other villages in the larger excluded area which

[12] The only other recorded reference to such a village is by the Sac and Fox leader Blackhawk who wrote much later that he visited such a village in *1815*.

the appellants now urge as proved. We do not stop to detail the evidence, which is exhaustively discussed in the parties' briefs, but it is plain that the Commission had even more reason to find against the existence of these Sac and Fox communities prior to the 1804 Treaty.[13]

The second main type of material which appellants proffer to us as invalidating the Commission's adverse findings consists of general statements, around and after 1804, by prominent American officials that the Sac and Fox hunted in, occupied, possessed, owned, or claimed territories which necessarily included either or both of the omitted segments. In submitting the 1804 Treaty to the Senate, President Jefferson said that the Sacs "own the country in the neighborhood of our settlements of Kaskaskia and St. Louis"[14]:

---

[13] A related argument by appellants is that under the Commission's determination the large Sac village of Saukenuk (which was situated at the southern end of the northern portion of Area 50 awarded below to the claimant) would have been left as an exposed Sac and Fox enclave on the east side of the Mississippi—without supporting hunting lands to the south and without the military protection of Sac and Fox country to the south. The suggestion is that the Sac and Fox would never have left their "capital" in such a precarious position—from both the defensive and the subsistence points of view—but would certainly have taken over the adjoining land to the south (which lies in the excluded sector between the Mississippi and Illinois Rivers). One answer the Commission could adopt is that this village lay directly across the Mississippi from large Sac and Fox territory in Iowa (not involved in this proceeding), including another large village, and was therefore not isolated on the west or north upon which it could draw both for protection and for food. In addition, the Commission could find that Saukenuk had a sufficient area immediately surrounding it, as well as a large area to the north (even if the west side of the Mississippi be omitted from consideration), for the subsistence needs of its population; and since there is no showing of *strong* hostile Indian forces to the south, in the excluded sector, the chiefs could have been content to let that sector remain unoccupied or only lightly infiltrated from time to time.

[14] The reference to Kaskaskia would include, appellants say, the southern part of the larger excluded segment, and the reference to St. Louis might cover the smaller excluded segment (but not necessarily so).

General Harrison (who negotiated the Treaty) told the Secretary of War in 1802 that the Sacs were a "considerable nation who reside between the Illinois River and the Mississippi" and in 1814 he wrote that as of the first part of the 19th century "the Sacs remained masters of the country to the north" of the Illinois River [15]; Secretary of War Dearborn, in empowering General Harrison to negotiate with the Sac and Fox in 1804, authorized him to obtain cessions "on both sides of the Illinois * * *; they ought to relinquish all pretensions to any land on the southern side of the Illinois, and a considerable tract on the other side, * * *"; Captain Meriwether Lewis reported in 1806 (after the Treaty) that the Sac and Fox still claimed the land on the east side of the Mississippi to the Illinois River and that "their principal hunting is on both sides of the Mississippi, from the mouth of the Ouisconsin [Wisconsin River] to the mouth of the Illinois River"; Lt. Pike described the Sac and Fox, in 1810, as hunting on both sides of the Mississippi in a region which encompassed both of the omitted sectors.

It would have been better if the Commission had dealt specifically with these statements, for materials of this kind have a direct bearing on the factual question of aboriginal title. See, *e.g.*, *The Snake or Piute Indians* v. *United States*, 125 Ct. Cl. 241, 254, 112 F. Supp. 543, 552 (1953). But on this record the Commission was not barred from deeming the statements insufficiently probative. For one thing, the phrasing of some of them is not very helpful to appellants: Secretary Dearborn's instruction to General Harrison is so ambiguously worded that it may well refer to Sac and Fox *claims* rather than to accepted ownership.[16] and President

---

[15] The land between the Illinois and the Mississippi (and similarly the land north of the Illinois) lies in the larger excluded segment.

[16] Part of Captain Lewis's statement is also a simple repetition of Sac and Fox *claims*.

Jefferson's acknowledgement of Sac ownership is so general that it could cover very little, if any, of the excluded areas. The relevant statements of General Harrison, Captain Lewis and Lt. Pike are more definite, but there are two interrelated grounds upon which the Commission could reject them as persuasive of Sac and Fox aboriginal title prior to 1804.[17] The first is that Article 7 of the 1804 Treaty, 7 Stat. 86, permitted the Sac and Fox to enjoy the privilege of living and hunting on the lands then being ceded until they were disposed of; reports of Sac and Fox hunting after 1804 would not, therefore, necessarily carry any solid implication as to pre-Treaty hunting. The second, and more important, reason is that these statements do not show that the Sac and Fox had hunted or controlled the disputed areas for "*a long time*" before 1804. We know, as the Commission pointed out, that the Sac and Fox settled in their primary village of Saukenuk and in the northern part of Area 50 (both awarded to them below) as early as the 1730's. But we also know that they did not begin to drive the Illinois tribes out of the large excluded segment to the south of this awarded area until after 1760, and that other Indian tribes were engaged in the same endeavor. Inter-tribal conflict for the territory left by the retreating Illinois Indians apparently continued for some time (see the discussion, *infra*). Assuming that the Sac and Fox emerged generally victorious toward the end of the 18th century, a trier of fact could properly decide that such a late conquest would not ripen into aboriginal title by 1804. The status of aboriginal ownership is not accorded to tribes at the very instant they first dominate a particular territory but only after exclusive use and occupancy "for a long time." This is as it should be—especially under the Indian Claims Commission Act which is the charter for doing justice between the Indians and the

[17] Defendant makes other points as to the defects in these statements, but we need not detail them.

United States' justice would not be vindicated if a tribe were able to claim a monetary award, on the ground that it was unfairly deprived by the Government of its original ownership of property, where the lands were but recently seized by conquest from another tribe. The rights of aboriginal title must have time to take root, transforming a conquered province into domestic territory. The Claims Commission Act, which seeks to repair damage caused by United States conquest of Indian lands, should not be turned into an engine for creating aboriginal title in a tribe which itself played the role of conqueror but a few years before.

On this facet of the case appellants urge that the unfavorable findings and determination are inconclusive because the Commission erred in thinking that there were other Indians inhabiting or claiming the disputed areas before 1804. Here, too, the lateness of the Sac and Fox mastery of the region—if those allied tribes did in fact control it by the first years of the 19th century—warrented the Commission in pointing to the conflicting claims and usages of neighboring tribes as bearing on the claimant's original title. The Illinois Indians were not driven out until the late 1760's; and thereafter the Potawatomis definitely claimed some of the disputed sections of the ceded parts of Area 50 (as well as others) adversely to the Sac and Fox and not jointly with them. In addition, in the latter part of the 19th century, there are references to two Iowa villages on the east side of the Mississippi in Illinois—in the larger disputed segment—which at the least indicate some Iowa possession.[18] As for the smaller excluded segment, there is likewise evidence of warfare between the Osages and the Sac and Fox suffici-

[18] The Commission was justified in referring to the testimony of appellants' expert witness (Dr. Wallace), in related proceedings before the Commission, to support the conclusion that two Iowa villages probably existed on the east side of the Mississippi before 1804. *United States* v. *Pink*, 315 U.S. 203, 216 (1942).

ently close to 1804 that the Commission could decide that a conquest by the latter, if it occurred before 1804, was too recent to ground a proper claim of aboriginal title; moreover, it is a fair inference that this conflict had not subsided by the time of the Treaty of 1804 since Article 10 of the Treaty embodies the Sac and Fox solemn promise and agreement "that they will put an end to the bloody war which has heretofore raged between their tribes and those of the Great and Little Osages." 7 Stat. 86. See also *Iowa Tribe* v. *United States*, 6 Ind. Cl. Comm. 464, 489, 508-509 (1958).[19] In sum, the Commission was not compelled by the record to find that the Sac and Fox had an exclusive and unchallenged claim to the disputed areas for the required span of time before 1804; other tribes were in the vicinity, at least until the closing years of the 18th century.

We conclude, for all these reasons, that the Commission could make the determination and findings it did as to the two excluded sectors. At this stage of litigation under the Indian Claims Commission Act it is, of course, redundant to say that on factual issues we are required to sustain the Commission if its resolution of the controversy is supported by substantial evidence in the record as a whole. *The Sac and Fox Tribe* v. *United States*, Appeal No. 10-61, Ct. Cl., decided Nov. 7, 1962, slip op. 6; *Yakima Tribe* v. *United States*, Appeal No. 4-61, Ct. Cl., decided Oct. 3, 1962, slip op.

---

[19] Appellants make the point that the Kickapoos must have "recognized" Sac and Fox ownership of the larger disputed area because, after 1819, when the former ceded their lands (on the south side of the Illinois River) to the United States, they sought and received permission from the Sac and Fox to cross the Illinois and live on the north and west side of the river. This was almost 15 years after the 1804 Treaty which had given the Sac and Fox federal permission to hunt and live in the territory being ceded; also, the exact nature of the arrangement between the tribes is very unclear. The Commission could justifiably regard this piece of evidence as having little probative impact on the status of the aboriginal title at the time of the treaty.

11, 19-20; and cases cited. Although briefs are often written as if we could weigh the evidence independently, we are powerless to do so. Confining ourselves to our own sphere, we can and do hold that there is sufficient substantial evidence in the record considered as a whole to sustain the refusal of the Commission to find that appellants' predecessors had aboriginal title to the two omitted sectors of Area 50.

The determination of the Commission, insofar as it is challenged on this appeal, is affirmed.

REED, *Justice' (Ret.)* sitting by designation, DURFEE, *Judge;* LARAMORE, *Judge;* and JONES, *Chief Judge*, concur.

| | |
|---|---|
| The Sac and Fox Tribe of Indians of Oklahoma, The Sac and Fox Tribe of Missouri and Sac and Fox Tribe of the Mississippi in Iowa, and Don Whistler, et al, and Columbus Keahna, appearing as the representatives of and on the relation of the Confederated or United Tribes of Sac and Fox Indians and as representatives and on behalf of all of the Members thereof,<br>*Petitioners,*<br>vs.<br>The United States of America,<br>*Defendant.* | Docket No. 83 |

(Decided: June 12, 1959, 7 Ind. Cl. Comm. 675-707)

## OPINION OF THE COMMISSION

WITT, Chief Commissioner, delivered the opinion of the Commission.

On November 3, 1804, the United States concluded a treaty of cession at St. Louis, Missouri, with certain chiefs of Sac and Fox Nation, in which the latter tribes ceded and relinquished forever to the United States all their right, title and interest to a vast area of land officially designated as Royce Cession 50 (7 Stat. 84). Royce Cession 50 embraces lands lying adjacent to, and bordering both sides of the Mississippi River.[1] They are located generally in southwestern Wisconsin, in practically all of the Illinois Territory northwest of the Illinois River, and in a sizeable portion

[1] Commission's Finding 3.

of northeastern Missouri situated between the Mississippi and Missouri Rivers.

The petitioner, Sac and Fox Nation, or Confederated Sac and Fox and its constituent bands, as the representative of and successor in interest to those members of the Sac and Fox Tribes who negotiated the 1804 treaty, seeks additional compensation for its ceded interest within Cession 50, which claimed area includes all of Cession 50 west of the Mississippi River and all east of the Mississippi River except for a large section in northeast Illinois. Petitioner contends that, at the time defendant acquired the lands in Cession 50, it had either a recognized or reservation title to the claimed area, or it held a perfected Indian title through exclusive use and occupancy.

The Commission on previous occasions has passed favorably upon the legal capacity of the petitioner to present and maintain claims of similar nature under the Indian Claims Commission Act; and in the instant case we find no reason to reach a different result. In addition we find that the Sac and Fox Nation, as presently constituted, is the proper representative of and successor in interest to those members of the Sac and Fox tribes who ceded their interest to the United States under the 1804 Sac and Fox Treaty.[2]

In making the above finding that the defendant acquired all of petitioner's interest, whatever it may be, in Cession 50 under the 1804 Treaty, the Commission is of course upholding the validity of this instrument. The Commission is well aware of the stipulation entered into between the parties on May 11, 1953, with respect to the validity per se of the 1804 treaty.[3] We think the stipulation is ineffective

[2] Commission's Finding 2.

[3] Commission's Finding 5—"... that the treaty of 1804 of itself has no validity but ... that the treaty set forth in paragraph 20 of the defendant's answer validated said treaty of 1804 ..."

in this regard and not binding on the Commission; the reason being that any question concerning the validity of a properly executed treaty is not open for ordinary judicial inquiry under any law or statute, or as regards the Commission under any of the provisions of the Indian Claims Commission Act. A treaty is fundamentally a political act initiated by Executive action in negotiating its terms, and then followed by Congressional approval through Senatorial concurrence or ratification.[4] It is the latter act of ratification that imparts legal effect to treaty and makes it together with the Constitution and all laws made in pursuance thereof the supreme law of the land. A properly executed treaty is binding on the courts, and only its interpretation and not its validity is open for judicial inquiry. (An exception not pertinent here lies when there is a conflict between a treaty provision and constitutional rights and guarantees). There are numerous cases in support of this view, some of which are cited in the Commission's Finding 4.

Petitioner's chief complaint against the validity of the 1804 Treaty is centered around the claim that the Sac and Fox chiefs who negotiated the cession lack authority to convey the tribal interests in Cession 50 or else they were subjected to undue influence and duress by the defendant in procuring their signatures to the document. In any event similar contentions with respect to the execution of other treaties have been rejected by the courts. Apropos to the instant case is the opinion of the Supreme Court in the case of *Fellows* v. *Blacksmith*, (1857), 15 L. Ed. 684, 685, in which the following is stated:

> "An objection was taken, on the argument, to the validity of the Treaty, on the ground that the Tona-

[4] Article 2, Section 2—U. S. Constitution— . . . He (President) shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.

wanda band of the Seneca Indians were not represented by the chiefs and head men of the band in the negotiation and execution of it. But the answer to this is, that the Treaty, after executed and ratified by the proper authorities of the government becomes the supreme law of the land, and the Courts can no more go behind it for the purpose of annulling its effect and operation than they can behind an Act of Congress."

This Commission, as do the courts, considers all treaties as valid and binding even though the Commission may at times look behind a treaty to consider the circumstances under which it was accomplished. But this is only for the limited purpose of determining whether a cause of action has been spelled out under Section 2 of our Act, and if we should find that a treaty has been executed under such circumstances, such a finding has no effect on the actual validity of the treaty.[5] Congress alone has the authority to abrogate or invalidate a treaty in whole or in part, and as far as this Commission can determine Congress has taken no steps to invalidate the Sac and Fox Treaty of 1804. It is therefore the Commission's view that the 1804 Sac and Fox Treaty is a valid treaty, and on the effective date of that treaty, which is the "date of taking" in this case, the Sac and Fox Nation ceded its interests in Cession 50 to the defendant.

We now reach the question of petitioner's claim of "recognized title" to the claimed area. According to the petitioner recognition of Sac and Fox interest in the subject lands was accorded by the United States under the provisions of the Fort Harmar Treaty of January 9, 1789 (7 Stat. 28) and/or the Greenville Treaty of 1795 (7 Stat. 49).

[5] 60 Stat. 1050 Sec. 2 "... (3) claims which would result if treaties ... were revised on the ground of fraud, duress, unconscionable consideration, etc. ..."

The Fort Harmar Treaty of January 9, 1789 was concluded with six Indian tribes, the Wyandot, Delaware, Ottawa, Chippewa, Pottawatomie and Sac tribes. Just four years before the United States had concluded a treaty at Fort McIntosh with the first four tribes by which certain boundary lines were established between the United States and the aforementioned Indian tribes.[6] According to Article I of the Fort Harmar Treaty its avowed purpose was "to renew and confirm all the engagements they (the Wyandots, Delawares, Ottawas, and Chippawas) had made with the United States of America, at the before mentioned treaty (Fort McIntosh), except so far as are altered by these presents.[7] There then follows a renewal and reaffirmation of the former boundary lines plus a cession of lands to the United States by the "said tribes".[8] Not until the Fourteenth Article of the treaty is there any mention of the Sac Tribe, and then in that article both the Sac and Pottawatomie nations are taken into the protection of the United States and peace established with them. Included in the same article is language making applicable all provisions of the Treaty to the Sac and Pottowatomie nations "so far as they apply to these nations."[9]

Even considering the language of the Ft. Harmar Treaty most favorably to the petitioner, we are convinced that those articles in the treaty, namely Articles I through IV, which might lend some support to petitioner's contention, do not apply to Sac Nation. Indeed Sac participation in the Fort

[6] 7 Stat. 16—Jan. 21, 1785: "Articles of a treaty concluded at Fort M'Intosh, the twenty-first day of January, one thousand seven hundred and eighty five, . . . and the Sachems and Warriors of Wiandot, Delaware, Chippawa and Ottawa Nations of the other."

[7] Commission's Finding 8(a).

[8] Commission's Finding 8(b).

[9] Commission's Finding 8(c).

Harmar Treaty was relatively minor when viewed in light of the over-all purpose of the said treaty. It amounted to little more than a mutual exchange of peaceful intentions with the defendant. No land cessions were taken, reservations created or boundaries fixed. Therefore, the Commission rejects petitioner's claim of recognized title to the claimed area by virtue of the provisions of the 1789 Ft. Harmar Treaty.

With respect to the 1795 Greenville Treaty petitioner claims recognition of title thereunder even in the role of a nonparticipating tribe. While the argument is rather unique in support of this position, the Commission finds it is without merit, and concludes that the petitioner, not being a party to the Greenville Treaty, has no standing upon which it may seek its benefits in this case. It is our view that the clear and unmistakable language of the Greenville Treaty evidences an intent by the United States to be obligated only to the signatory tribes. If this Commission should strain treaty language and award a recognized title to the petitioner, it would unduly penalize the signatory tribes, who, while receiving the treaty benefits, also accepted its accompanying burdens.

Petitioner also suggests that under our decision in the *Miami* case,[10] this Commission "reserved and did not pass upon the question of whether the United States by the Treaty of Greenville recognized the title of tribes to lands in the Northwest Territory which were not signatories to the Treaty."[11] Petitioner then cites page 221 of our opinion

[10] *The Miami Tribe of Oklahoma, et al.* v. *United States*, 5 Ind. Cl. Comm. 180.

[11] Petitioner's Brief, p. 4.

in Docket 253 in support of this proposition.[12] We think petitioner has misread the language contained therein. What the Commission had reference to was a possible future conflict between the recognized title holdings of the signatory tribes to the Greenville Treaty and the aboriginal rights of the non-signatory tribes within the same general area. What the Commission actually determined in the *Miami* case is adequately set out in the Commission's Finding 6 therein:

> "6. By Articles IV and V of the Greenville Treaty, the United States recognized the title of each of the *tribal signatories* to the territory each had a right to, which the United States relinquished by Article IV . . ."[13]

The Commission therefore rejects petitioner's proposition that the 1795 Treaty of Greenville extended to the Sac and Fox Nation, a nonsignatory tribe, the benefits of a recognized title to the claimed area within Royce Cession 50.

We now turn our attention to the difficult problem involving petitioner's contention of aboriginal title to the claimed area. Because of the early 1804 "date of taking" the documentary evidence is meager. With this in mind, the Commission took upon itself the task of reexamining the documentary evidence and testimony in the Sac and Fox cases involving adjoining areas, principally Dockets 158, 153, and 135, with the hope that such an effort would

---

[12] 5 Ind. Cl. Com. 180, 221—"It must be remembered that the General (Wayne) was dealing with groups of hostile Indians whose territorial rights were unknown and could not be ascertained, so he fixed overall boundaries within which the *signatory tribes* would be protected as to the separate lands each had a right to. Such arrangement would not seem to change or affect the *aboriginal rights of nonsignatory tribes* within the Northwest territory, but that is a question to be settled when needed for its determination arises." (Emphasis supplied.)

[13] 5 Ind. Cl. Com. 180, 188.

prove helpful in filling in the overall picture of Sac and Fox tribal movement and activity, beginning around 1730 when the two tribes became closely affiliated, up until the 1804 Treaty.

It was during the period of the French-Fox Indian war, from about 1712 to 1735 that the Sac and Fox tribes formed their close alliance. Both tribes were then situated around the Green Bay and Fox River area in Wisconsin. The Fox tribe had been in control of the Fox-Wisconsin River portage and the French in their attempt to extend their trade routes westward had repeatedly clashed with these Indians. The continued friction between them precipitated an all out war marked by bitter and bloody fighting. French superiority in men and material finally overcame the stubborn Indian resistance and Foxes were forced to retreat southwestward down the Wisconsin River toward the Mississippi River. At the same time the Sac Tribe of Indians had become sympathetically involved with the Fox cause, and in like manner was forced to retreat in a body from the French pursuers. Both tribes in a concerted effort reached the Mississippi River together and, crossing over into Iowa, sought refuge along the Wapsinipicon and Des Moines River. The year was about 1735 and, according to Dr. Anthony Wallace, who testified as an expert in behalf of the petitioner, the Sac Tribe established its famous village near the mouth of Rock River in Illinois approximately three miles from the Mississippi River. Dr. Wallace also testified that, with the cessation of hostilities with the French, large segments of the Sac tribe began to drift back into northern Illinois and Wisconsin where they established village sites along the Wisconsin River and even further north.

Around 1764 the Sac tribe returned to its Rock River village and continued to occupy it up until 1804 and for some years thereafter. About the same time the Fox Indians

were establishing an important village site west of the Mississippi near Dubuque, Iowa. There they set about developing the rich lead deposits which were concentrated in this area as well as on the east side of the Mississippi River near the present town of Galena, Illinois.

Before 1765 the Illinois confederacy, consisting of the Cahokia, Kaskaskia, Michigamea, Moingwena, Peoria, and Tamaroa tribes of Indians controlled the greater part of Cession 50 east of the Mississippi. The Illinois were almost constantly harassed by the tribes from the north and this ever increasing pressure, coupled to their new found attachment to the white man's vices, decreased their numbers to an alarming extent and resulted in their withdrawal southward down the Illinois River toward the Mississippi River and into the area around Kaskaskia, Illinois. As the Illinois retreated southward the northern tribes moved into their country. Of these tribes, besides the Sac and Foxes, who for the most part concentrated in the northwest portion around the Rock River area, could be counted principally the Kickapoo, Pottawatomie, and Winnebago.

On the west side of the Mississippi River the Iowa tribe of Indians by 1765 had moved eastward from their village sites near the present city of Council Bluffs, Iowa, and established a principal village on the Des Moines River near the present site of Selma, Iowa. A second important Iowa village was located on the Iowa River, while two other Iowa villages, as of 1804, were reported on the east side of the Mississippi River within the claimed area. With the arrival of the Iowa Nation into eastern Iowa, the Sac and Fox tribes drew closer to it, and both groups began to share the usage of a large portion of Eastern Iowa adjacent to the Mississippi River. Both nations frequently hunted together, and each extended their hunting excursions west,

south and southwest into Iowa, Missouri and over toward the banks of the Missouri River.

By 1800 the greater part of Sac and Fox tribal activity was west of the Mississippi. With the exception of the principal Sac village on the Rock River, there were no other Sac and Fox villages of any significance east of the Mississippi River prior to 1804. Besides the Fox village near the lead mines at Dubuque, Iowa, other Sac and Fox villages west of the Mississippi during the period in question were reported at the mouth of the Turkey River above Dubuque, and at the mouths of the Iowa and Des Moines Rivers.

Apart from subsistence hunting, which was conducted within close proximity of the village sites, the principal Sac and Fox hunting grounds at the beginning of the 19th century lay west of the Mississippi River in Iowa and eastern Missouri and across to the Missouri River. From the latter part of the 1790's until the 1804 Treaty bitter and continuous fighting raged between the Osages and the Sac and Fox for control of the adjacent hunting areas north of the Missouri river.

This brief outline of Sac and Fox movement through the claimed areas east and west of the Mississippi touches only upon the highlights, the full development of which the Commission has set out in considerable detail in Findings 13 through 20. Nevertheless it does give some insight to the extent of the movement and actual use of the claimed area upon which the Sac and Fox seek to impress an Indian title. We stress actual use, for this Commission had occasion in its recent decision, in the *Northern Paiute* case, to reaffirm the principle of "actual exclusive use and occupancy" as a prime element in perfecting Indian title.[14] In that case we stated:

---

[14] *The Northern Paiute Nation, et al., v. United States*, 7 Ind. Cl. Com. 322.

> "Any determination of Indian title to an area of land must be based on affirmative evidence establishing actual exclusive use and occupancy of the area from time immemorial. Constructive possession is not sufficient to establish Indian title. The law in this regard is clear and well settled." (citing cases).[15]

Looking now at the Sac and Fox picture in Cession 50 east of the Mississippi at the time of the 1804 Treaty, the Commission finds the Sac and Fox Nation had perfected Indian title to the northeast portion of the claimed area, which would include those sections delineated as Areas "B" and "C", and a small portion of Area "D" on the petitioner's exhibit 409. A more accurate description of the bounded area is set out in Commission's Finding 21(a). Actual exclusive control from time immemorial to sustain Indian title was demonstrated to the Commission's satisfaction; the evidence showing a long history of traditional Sac and Fox land use within the Rock River and Wisconsin River area, the early and prolonged existence of the famous Sac village near the mouth of the Rock River, the adjacent Sac and Fox villages at Dubuque, Iowa, and on the Wisconsin River, as well as the history of Indian lead mining activities at nearby Dubuque and around the Galena area in Jo Davies County, Illinois.

As to the balance of the claimed area lying between the Mississippi River and the Illinois River which coincides with the rest of Area "D" as shown on petitioner's Exhibit 409, the Commission is unable to sustain petitioner's claim of Indian title thereto. The evidence failed affirmatively to show actual and exclusive use and occupancy over this vast area. Reports of the extent and frequency of Sac and Fox hunting prior to 1804 are vague to say the least. The eastward extent of Sac and Fox hunting efforts was particularly

---

[15] *Ibid*, p. 409.

conjectural. No Sac and Fox village of any significance can be located within this region prior to 1804. Subsistence hunting alone as conducted within the close proximity of villages could not support a claim for this entire area. Expert testimony in behalf of Sac and Fox claims of exclusive occupancy and possession cannot be tied to any independent affirmative evidence in the record. Reports of the extent other tribes hunting within this area are as reliable as Sac and Fox versions, and those accounts of Sac and Fox hunting therein subsequent to 1804 are only consistent with privileges reserved under the 1804 Treaty.[16] The Iowa Nation had at least two villages within the claimed area. From all the evidence in this case, the Commission pictures this area in 1804 as one of nonexclusive use, subject to the conflicting claims and usages of neighboring tribes, and that this condition was created by the withdrawal of the Illinois tribes below the Illinois River.

As to those lands within the boundaries of Cession 50 west of the Mississippi River in eastern Missouri, which are shown as Area "A" on petitioner's exhibit 409, the Commission finds that as of the effective date of the 1804 Treaty, the Sac and Fox had perfected Indian title to all of that area north of Cuivre River, a more accurate description of which is set out in the Commission's Finding 21(b).

While the Sac and Fox had no village sites within this area at the time of the 1804 Treaty, the evidence reflects consistent Sac and Fox hunting activity for many years prior thereto. In addition, the reports of Sac and Fox fighting to keep the Osage Indians confined to the Missouri River demonstrates Sac and Fox tribal efforts to maintain its exclusive possession of these hunting grounds.

---

[16] Commission's Finding 6.

Having reached a determination of the title question in petitioner's favor as to those areas set out in the Commission's Finding 21, judgment shall be reserved until proof is offered relative to the consideration paid for the ceded lands, the total acreage of the area involved, and the value of the same as of the date title passed to the defendant.

Edgar E. Witt
Chief Commissioner
Wm. M. Holt
Associate Commissioner

## APPENDIX C

D. EX. 6.

*Message, December 31, 1804,* from President Jefferson to the Senate of the United States

December 31, 1804

*To the Senate of the United States:*

Most of the Indians residing within our Northern boundary, on this side the Mississippi, receiving from us annual aids in money and necessaries, it was a subject of complaint with the Sacs, that they received nothing, and were connected with us by no treaty. As they own the country in the neighborhood of our settlements of Kaskaskia and St. Louis, it was thought expedient to engage their friendship; and Governor Harrison was accordingly instructed, in June last, to propose to them an annuity of five or six hundred dollars, stipulating, in return, an adequate cession of territory, and an exact definition of boundaries. The Sacs and Foxes, acting generally as one nation, and coming forward together, he found it necessary to add an annuity for the latter tribe also, enlarging proportionately the cession of territory; which was accordingly done by the treaty now communicated, of November the 3rd, with these two tribes.

This cession giving us a perfect title to such a breadth of country on the eastern side of the Mississippi, with a command of the Ouisconsin, strengthens our means of retaining exclusive commerce with the Indians, on the western side of the Mississippi; a right indispensable to the policy of governing those Indians by commerce rather than by arms.

The treaty is now submitted to the Senate for their advice and consent.

TH. JEFFERSON

S & F Ex. 13

*Letter, June* 27, 1804, Secretary of War to William H. Harrison

War Department, June 27, 1804

Sir:

Your Excellency's letter, of the 24th ultimo, has been duly received and considered. It is the opinion of the President of the United States, that every reasonable accommodation ought to be afforded the old Kaskaskias' chief (Ducoigne). * * * Directions will be given, for having the boundary line ascertained, run, and marked as soon as possible. All adjustments with these nations, whose claims may interfere with the Kaskaskias' boundary, as per treaty will rest with your Excellency. You will take such measures, and make such pecuniary advances to individual chiefs or others, as their respective cases require. It may not be improper to procure from the Saes, such cessions on both sides of the Illinois, as may entitle them to an annual compensation of five or six hundred dollars; they ought to relinquish all pretensions to any land on the southern side of the Illinois, and a considerable tract on the other side; * * *

S & F EX. 10

Letter, February 26, 1802,
William Harrison to Secretary of War

* * *

The Sacks or Sackees, a considerable nation who reside between the Illinois river and the Mississippi, were not included in the treaty of Greenville. They sent deputies to agree to a cessation of hostilities the spring previous to the treaty, but by some accident or other, they mistook the time, and did not attend the treaty. They are now

extremely desirous to be put on a footing with the other tribes, and receive an annual present, and it appears reasonable that they should.

S & F EX. 300.

Extract from Letter, William Henry Harrison to Secretary of War, March 22, 1814

H.Q. Cincinnati, March 22nd, 1814

* * *

When I was first appointed governor of Indiana Territory, these once powerful tribes were reduced to about thirty warriors, of whom twenty-five were Kaskaskias, four Peorians, and a single Michiganian. There was an individual lately alive at St. Louis, who saw the enumeration made of them by the Jesuits in the year 1745, making the number of warriors four thousand. A furious war between them and the Sacs and Kickapoos, reduced them to that miserable remnant, which had taken refuge amongst the white people of the towns of Kaskaskia and St. Genevieve. The Kickapoos had fixed their principal village at Peoria, upon the south bank of the Illinois river, whilst the Sacs remained masters of the country to the north.

* * *

It is a fact, that for many years the current of emigration, as to the tribes east of the Mississippi, has been from north to south. This is owing to two causes; the diminution of those animals from which the Indians procure their support; and the pressure of the two great tribes, the Chippewas and Sioux to the north and west. So long ago as the treaty of Greenville, the Potawatamies gave notice to the Miamies, that they intended to settle upon the Wabash. They made no pretensions to the country, and their only excuse for the intended aggression, was that

'they were tired of eating fish, and wanted meat.' It has been already observed that the Sacs had extended themselves to the Illinois river, and that the settlement of the Kickapoos at the Peorias was of modern date.

* * *

S & F EX. 285

Extract from "A Statistical View of the Indian Nations inhabiting the territory of Louisiana, and the countries adjacent to its Northern and Western boundaries", prepared by Captain Meriwether Lewis and communicated to Congress February 19, 1806 by President Jefferson.

* * *

Saukees and Renards, or Foxes, These nations are so perfectly consolidated, that they may in fact be considered as one nation only they speak the same language, they formerly resided on the east side of the Mississippi, and still claim the land on that side of the river, from the mouth of the Ouisconsin to the Illinois river, and eastward towards lake Michigan, but to what particular boundary I am not informed; they also claim, by conquest, the whole of the country belonging to the ancient Missouries, which forms one of the most valuable portions of Louisiana; but what proportion of this territory they are willing to assign to the Ayouwais, who also claim a part of it, I do not know. As they are at war with the Sioux, who live N. and N.W. of them, except the Yankton Ahnah, their boundaries in that quarter are also undefined; their trade would become much more valuable if peace was established between them and the nations west of the Missouri, with whom they are at war; their population has remained nearly the same for many years; they raise an abundance of corn, beans, and melons; they sometimes hunt in the country west of them towards the Missouri, but their principal hunting is on both sides of the Mississippi, from

the mouth of the Ouisconsin to the mouth of the Illinois river. These people are extremely friendly to the whites, and seldom injure their traders; but they are the most implacable enemies to the Indian nations with whom they are at war; to them is justly attributable the almost entire destruction of the Missouries, the Illinois, Cahokias, Kaskaskias, and Peorias.

S & F EX. 361

Extract from Ethnography of the Mississippi, by Zebulon M. Pike (originally published in 1810).

Page 337/39

The first nation of Indians whom we met with in ascending the Mississippi from St. Louis were the Sauks, who principally reside in four villages. The first at the head of the rapids De Moyen on the W. shore, consisting of 13 log lodges; the second on a prairie on the E. Shore, about 60 miles above; the third on the Riviere de Roche, about three miles from the entrance; and the fourth on the river Iowa.

They hunt on the Mississippi and its confluent streams from the Illinois to the river Des Iowa; and on the plains west of them, which border the Missouri. They are so perfectly consolidated with the Reynards that they scarcely can be termed a distinct nation; but recently there appears to be a schism between the two nations, the latter not approving of the insolence and ill-will which has marked the conduct of the former toward the United States on many late occurrences. They have for many years past, under the auspices of the Sioux, made war on the Sauteaux, Osages, and Missouries; but as recently a peace has been made between them and the nations of the Missouri through the influence of the United States, and by the same means

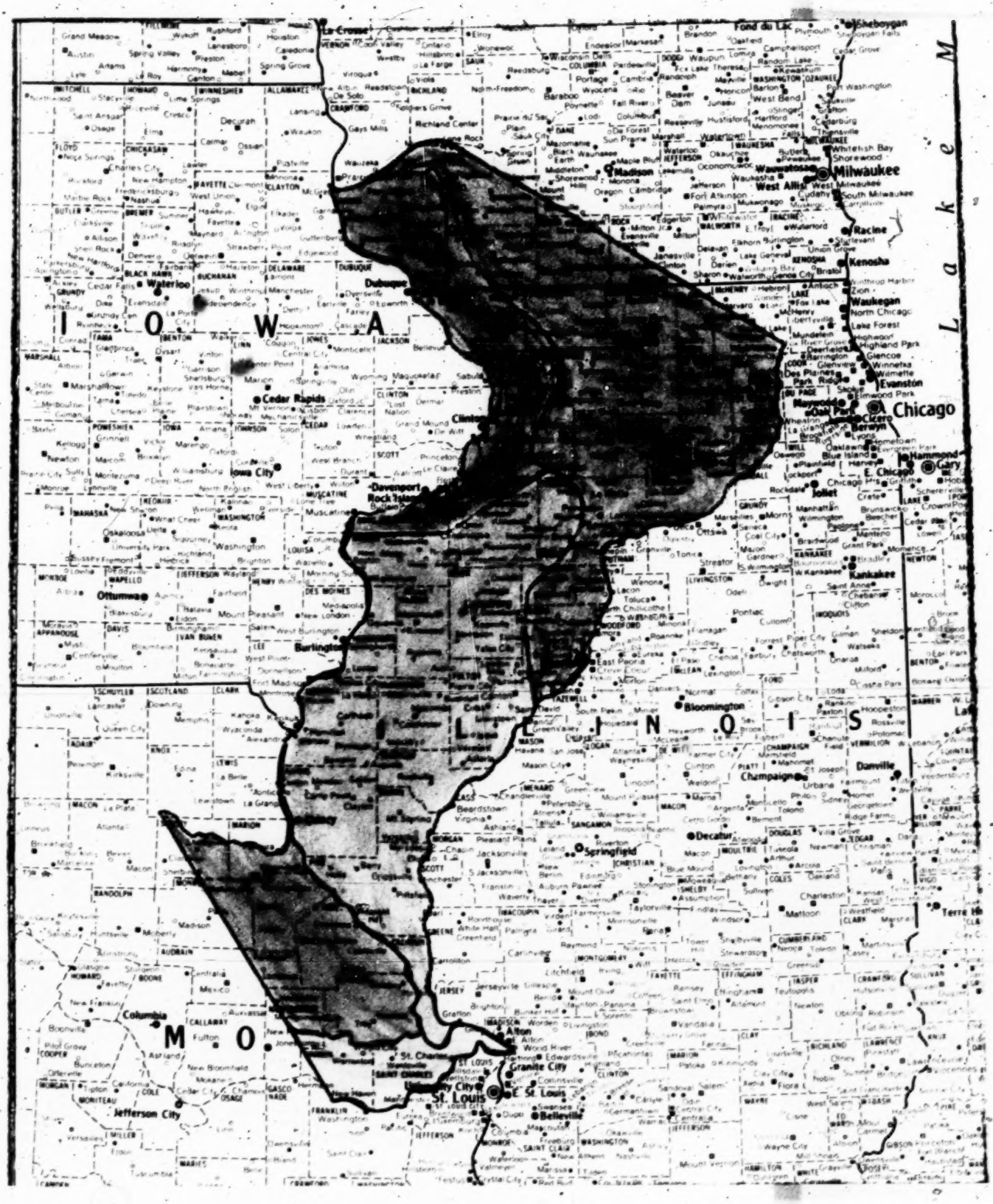
between the Sioux and Santeaux, their principal allies, it appears that it would by no means be a difficult matter to induce them to make a general peace, and pay still greater attention to the cultivation of the earth; as they now raise a considerable quantity of corn, beans, and melons. The character that they bear with their savage brethren is that they are much more to be dreaded for their deceit and inclination for stratagem than for their open courage.

The Reynards reside in three villages. The first is on the W. side of the Mississippi, six miles above the rapids of the River De Roche; the second is about 12 miles in the rear of the lead mines; and the third is on Turkey river, half a league from its entrance. They are engaged in the same wars and have the same alliances as the Sauks, with whom they must be considered as indissoluble in war or peace. They hunt on both sides of the Mississippi from the Iowa, below Prairie Des Chiens to a river of that name [Upper Iowa], above said village. They raise a great quantity of corn, beans, and melons; the former of those articles in such quantities as to sell many hundred bushels per annum.

The Iowas reside on the De Moyen and Iowa rivers in two villages. They hunt on the W. side of the Mississippi, the De Moyen, and westward to the Missouri; their wars and alliances are the same as those of the Sauks and Reynards, under whose special protection they conceive themselves to be. They cultivate some corn, but not so much in proportion as the Sauks and Reynards. Their residence being on the small streams in the rear of the Mississippi, out of the highroad of commerce, renders them less civilized than those nations.

The Sauks, Reynards, and Iowas, since the treaty of the former two with the United States [in 1804], claim the land

from the entrance of the Jaufllioni [see note 14, p. 11], on the W. side of the Mississippi, up the latter river to the Des Iowa, above Prairie Des Chiens, and westward to the Missouri; but the limits between themselves are undefined. All the land formerly claimed by those nations E. of the Mississippi is now ceded to the United States; but they have reserved to themselves the privilege of hunting and residing on it, as usual.


I O W A
L L I N O I S
M O
Lake Michigan
Chicago
Milwaukee
Madison
Waterloo
Dubuque
Cedar Rapids
Iowa City
Davenport
Rock Island
Ottumwa
Burlington
Peoria
Bloomington
Springfield
Champaign
Danville
Decatur
Kankakee
Joliet
Evanston
Waukegan
Kenosha
Racine
Gary
Hammond
Columbia
Jefferson City
St. Louis
E. St. Louis
Granite City
Alton
Belleville